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No. 174.

In the Supreme Court of the United States.

THE IRON CLIFFS COMPANY, ET AL.,

PLAINTIFFS IN ERROR,

vs.

NEGAUNEE IRON COMPANY, ET AL.,

DEFENDANTS IN ERROR.

MAIN BRIEF FOR PLAINTIFFS IN ERROR.

JAMES H. HOYT,
Attorney for Plaintiffs in Error.

ELIHU ROOT,
JAMES H. HOYT and
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Supreme Court of the United States.

THE IRON CLIFFS COMPANY, THE CLEVELAND-CLIFFS IRON COMPANY, WILLIAM G. MATHER AND MURRAY M. DUNCAN,

PLAINTIFFS IN ERROR,

vs.

NEGAUNEE IRON COMPANY, EDWARD N. BREITUNG AND MARY KAUFMAN,

DEFENDANTS IN ERROR.

MAIN BRIEF FOR PLAINTIFFS IN ERROR.

This Court has jurisdiction herein, because of the *federal question* set up and claimed both in the state courts and here, — upon which question the courts of Michigan ruled against the plaintiffs in error.

We claim that by the judgments and decrees of the courts of Michigan the property of plaintiffs in error, William G. Mather and the Iron Cliffs Company, was taken *without due process of law.*

These plaintiffs in error were, before the beginning of this suit, and still are, stockholders of the Pioneer Iron Company;—a large proportion of the value of the stock of which company consisted of its ownership in a certain lease, giving it the right to mine for iron ore for the term of 99 years.

The courts of Michigan, in the absence of the Pioneer

Iron Company as a party to the suit, by their judgment and decree, cut off and terminated this lease and all rights of the Pioneer Iron Company under it. The Pioneer Iron Company, not being a party to the suit, could not be and was not heard in defence of its property and said plaintiffs in error were not represented in defence of their corporate property rights.

Plaintiffs in error by pleading and in argument protested against the rendition of judgment in absence of the Pioneer Iron Company, and set up and claimed their rights under the Fourteenth Amendment of the Federal Constitution that said company should be heard, explicitly advising the state courts of the exact claims now made; but the Michigan courts decided against them on those claims and rights, and rendered the judgment here complained of.

STATEMENT OF FACTS.

The Pioneer Iron Company was the lessee and owner of a lease, under which it had the right, for 99 years to mine for iron ore on large tracts of land in Marquette County, Michigan. No person other than said company and its stockholders was interested in that lease, and no other person claimed any rights therein.

On the 3rd of March, 1900, defendants in error began this suit in the Circuit Court in Marquette County, praying; (1.) That all the rights and privileges granted in the 99 year lease from Harvey to the Pioneer Iron Company be declared terminated; (2.) That said lease be cancelled as a cloud upon complainants' title, and that said title to all the iron ore and marble in and upon said lands be quieted and confirmed in complainants; (3.) That complainants be granted a perpetual injunction, preventing defendants, who were parties to the suit, from setting up in the name of the Pioneer Iron Company, or in any other manner, any right or title un-

der said lease from Charles T. Harvey to the Pioneer Iron Company, and from entering upon said lands or removing therefrom any iron ore, etc.

As the basis for the relief asked, numerous acts and defaults of the Pioneer Iron Company were set out,—all of which were claimed to result in the termination of all the rights of said company under this 99 year lease; and it was also alleged that the defendants, acting in the name of the Pioneer Iron Company, as stockholders, directors and agents of said company, were wrongfully asserting in its name, its existing and continuing right to mine under said lease, and were in the act of mining and removing iron ore from said premises.

Although the rights and property of the Pioneer Iron Company were thus the whole subject of this attack, that company was not made a party to the suit.

The Circuit Court of Marquette County, Michigan, after hearing the entire case,—by its decree proceeded to find and did pass upon the rights of the Pioneer Iron Company under said lease, and found and adjudged that it had forfeited its rights therein and thereunder, and that the same were terminated and had ceased to exist, (Record, pages 556, 557, 558, 559), and said Court as a part of its aforesaid decree, concluded as follows:

> "In consideration of the foregoing findings and determinations of the Court concerning the particular matters set forth in the complainants' bill of complaint, it is ordered, adjudged and decreed;
>
> "That the defendants, their counselors, attorneys, solicitors and agents, and each and every of them, whether acting in their individual or *representative capacity*, immediately vacate and remove from the lands described in the bill of complaint, and that they and each of them be and they hereby are perpetually enjoined from further entering upon the said lands of the complainants for the purpose of explor-

ing for or taking therefrom any minerals or iron ore, or for any purpose whatever without the consent and authority of the complainants. (Record, page 559.)

On appeal, the Supreme Court of the State of Michigan, by its decree, (Record, page 577), "ordered, adjudged and decreed that the decree of the Circuit Court of Marquette County in Chancery be, and the same is hereby, in all things, affirmed."

By the judgments of the courts of Michigan, it is thus apparent that the 99 year lease from Harvey to the Pioneer Iron Company has been terminated; and its officers, whether acting *individually or as representatives of the Pioneer Iron Company,* are perpetually enjoined from asserting the rights of said company under said lease by entering upon the premises or prosecuting the work of mining thereon.

Inasmuch as the entire litigation was in absence of the Pioneer Iron Company as a party to the suit, its property was thereby "taken;" and, since the value of the stock of the company was dependent upon the property, rights and interests owned by said company, — it must follow that the property of the stockholders in said company (plaintiffs in error), was *taken without due process of law.*

THE 99 YEAR LEASE.

Its History.

Early in the year 1857, one Charles T. Harvey, then residing at Marquette, Michigan, originated and undertook the promotion of a corporation known as "The Pioneer Iron Company." He induced a number of eastern capitalists to agree to join him and put money into the enterprise. (Testimony of Harvey, Record, pages, 478-491).

On April 22, 1857, the Pioneer Iron Company was chartered under the Mining and Manufacturing Act of Michi-

gan, with a capital of $125,000, divided into 5,000 shares of the par value of $25.00 each, as alleged in the bill and admitted in the answer. Charles T. Harvey was one of the incorporators, and as shown by Exhibit "B." attached to the bill, owned 1668 shares of stock in said company.

Before and for many years after chartering this company, Harvey was the agent and trustee of the stockholders of this company in Michigan,—none of whom were residents or appeared to have been personally familiar with the business which was being conducted at Marquette. Of this Harvey says: —

> "I negotiated these deeds and contracts in the State of Michigan. I was their agent and trustee in that state, that is, I was their agent trusted by them. I was never their official trustee, of course. They trusted me to do these things for the company. I promoted the company, that is, originated the company; got these gentlemen to take stock and join me in the enterprise." (Record, page 491).

Harvey undertook the task of acquiring land useful for the purposes of this corporation, and in doing this appears to have chosen the method of passing title through himself while acting as the agent and trustee of the corporation.

In the winter of 1857 he negotiated with the Jackson Iron Company to furnish iron ore to the proposed Pioneer furnace,—and on February 26, 1857, he consummated the purchase from James L. Reynolds of 4162 acres of land in Marquette County, which is referred to in the bill of complaint.

That Reynolds was the owner of this land in fee is admitted on the pleadings.

On the day last named, Reynolds and wife, for a valuable consideration, (alleged in the deed to have been $30,000), conveyed said lands by warranty deed in fee simple to Charles T. Harvey of Marquette, "his heirs and assigns forever."

Following the description in this deed are the following

words: "which lands are sold with full warranty, subject, "however to the conditions and agreements of the contract "marked "A," herewith appended, between the parties hereto, "concerning the undiscovered minerals on said lands."

Then follows the habendum clause and clauses of full warranty in usual form.

Contract "A" referred to in this warranty deed from Reynolds to Harvey is as follows:

> "This Memorandum of Agreement made this 26th day of February, by and between James L. Reynolds of Chicago, State of Illinois, of the first part and Charles T. Harvey of Marquette County, State of Michigan, of the second part,
>
> WITNESSETH; That the party of the first part has this day conveyed by "Warrantee" Deed (to which this contract is attached) to the party of the second part certain lands therein described amounting to Four thousand one hundred and sixty-two 46-100 acres, for the consideration of the sum therein named, and also *in the further consideration of reserving* to himself an undivided half interest in and to all the minerals which have been or may be discovered on the premises referred to as conveyed, together with the right of having, or acquiring so much of the surface privileges as may be necessary to mine or develop the same, by paying one-half of the equitable or appraised valuation per acre, for the surface thus used or acquired. PROVIDED not more than twelve dollars per acre shall be adjudged to be the value of the unimproved lands taken for such mining purposes; besides which, however, full compensation shall be paid to the party of the second part, or his assigns, for damages, which may by such mining or occupancy ensue to the business connected with or improvements placed upon such land, by the party of the second part or his assigns. Such payment to be made by the party of the first part on an equitable, agreed value, or upon an appraised valuation made by disinterested "Referees," one designated by each party

(hereto), and they chosing a third, and the decision of the three thus chosen to be final. And when such payment is made, he of the first part shall be entitled to enter upon and occupy any portion of said lands for mining purposes as aforesaid solely.

PROVIDED; And it is agreed, however, that the party of the second part, or his assigns, shall have the sole right, free of cost or compensation to the party of the first part, to mine for their own use or *for manufacturing purposes, within the present limits of Marquette County,*—any mineral ores or marble found on any of the premises herein "referred" to, but shall have no right to sell to other parties for exportation as aforesaid without accounting to the party of the first part for his joint half interest therein.

IN WITNESS WHEREOF the parties hereunto have set their hands and seals the day and year first above written.

CHARLES T. HARVEY, (Seal.)
JAMES L. REYNOLDS. (Seal.)

Conveyance from Harvey to the Pioneer Iron Company.

On April 22, 1857, Harvey conveyed to the Pioneer Iron Company, by warranty deed, 3488 out of the 4162 acres of land, which he bought from Reynolds less than two months before, the consideration named in this deed being $25,000. On the same day that he executed the foregoing deed for 3488 acres, Harvey also executed an agreement to the Pioneer Iron Company, for which the "99 year lease" was afterwards substituted.

Said temporary agreement was as follows (Record, page 408);

This indenture, made this 22nd day of April, in the year 1857, between Charles T. Harvey, of Marquette County, State of Michigan, of the first part, and the Pioneer Iron Company (a corporation exist-

ing by virtue of the laws of the State of Michigan, and doing business in said county and State) of the second part.

WITNESSETH; that the party of the first part for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged and confessed, has bargained and conveyed, and by these presents does bargain and convey, certain rights and privileges hereinafter mentioned, with the limitations and provisions thereto annexed, on, in and to the lots or parcels of land known and described as follows, to-wit:—

The southwest quarter of the southeast quarter and the southwest quarter of section No. five (5), the southeast quarter, and all of the east half of the southwest quarter not now already owned in fee by the party of the second part hereto of section No. six (6). The north half of the northeast quarter, and the northeast quarter of the northwest quarter, of section No. seven (7). The northwest quarter of the northwest quarter of section No. eight (8). All in township No. forty-seven (47) north of range No. twenty-six (26) west, containing five hundred and eighty (580) acres in the same. Also the west half of the southwest quarter of section No. thirty-one (31) (fractional) in township No. forty-eight (48) north of range No. twenty-six (26) west, containing sixty-six 29-100 (66 29-100) acres in the same.

All said lands being situated in the county of Marquette and State of Michigan, amounting as above described in all to six hundred and forty-six 29-100 (646 29-100) acres.

The aforesaid rights and privileges on, in and to said lands being:

First. The right to cut and remove all the timber and wood standing or otherwise thereon, for purpose of converting the same into charcoal for manufacturing purposes or such other uses as may be desirable to the party of the second part. Such

wood and timber to be used and removed within five years from date, when within that period it shall suit the convenience of the party of the second part thus to do. Provided, however, that after clearing its own land in fee, on section six, T. 47, R. 26, it shall next remove the timber from the balance of land in that section herein described until it is all removed. Then it shall remove that on section seven (7) herein mentioned. Then that on section eight (8) in like manner. Then next in succession that on section five (5) after clearing its own land on the same, and lastly those in section thirty-one (31), in township 48 of range 26 west. This stipulation, however, at all times to be subject to future agreements between the parties hereto. Provided further, that as far as may be consistent with the interest of said company, it being the judge in these respects, the land when the timber is removed shall be left in favorable condition for improvements, particularly with a view to the erection of other furnaces thereon.

Second. The party of the second part shall have *in perpetuity* the right, free of charge (except for land damages hereinafter mentioned), to mine, obtain and use, any ores or marbles found on said lands, or on any other lands now owned by the party of the first part in either of the townships above mentioned, provided it shall not mine or obtain any ores on said lands except what *it shall actually convert into merchantable iron in its own establishment.* It shall also be at its own expense for mining, and shall not use or injure the improvements placed upon the lands by others without paying just and equitable damages therefor.

Neither shall it be entitled to take any more land to occupy than is clearly necessary to open the mine for iron ore or marble to be obtained readily therefrom, and shall pay $12 per acre for unimproved lands which it may require.

These privileges shall only descend to the party

of the second part's successors in corporate succession.

The party of the first part agrees not to in any wise convey the lands mentioned except with a reservation of these rights and privileges to the party of the second part.

These rights and privileges are made subject, however, to the terms of the prior deed of James L. Reynolds and wife to the party of the first part by which he acquired title to the lands mentioned, which reservations were known prior to the executing of this indenture.

In witness whereof, the party of the first part has hereto set his hand and seal the day and year first above written.

CHARLES T. HARVEY, (Seal.)

Sealed and delivered in presence of
W. H. PEARSE,
G. L. FORD.

This instrument was put in evidence. (Record, page 408). The fact, that it was delivered to the Pioneer Iron Company, that it was never recorded and that *the* 99 *year lease*, executed by Harvey to the Pioneer Iron Company on September 17, 1857, was by the agreement of the parties, substituted for it,—would show that the 99 year lease was a part of the same transaction between Harvey and the Pioneer Iron Company,—which is evidenced by his deed to it. last referred to. The identity of these transactions is conclusively proven by the testimony of Charles T. Harvey. (Record, pages 492, 493).

Harvey testified that this unrecorded lease made on the same day as the deed, was a memorandum given at the time as the evidence that at the proper time an instrument of that nature should be given, but that it was considered as a safeguard against anything happening to him in the meantime, — simply as a protection to the Pioneer Iron Company, — a

memorandum to be entirely superseded by the conveyance to be given later, *i. e.*, the "99 year lease" of September 17, 1857. (Testimony of Harvey, Record page 493).

The Pioneer Iron Company gave direct to Reynolds its obligation for $25,000 of the amount of the consideration named in the conveyance, securing the same by a mortgage, and afterwards paying it in full.

The 99 Year Lease.

On September 17th, 1857, Harvey executed to the Pioneer Iron Company the lease, of which the agreement of April 22, 1857 just mentioned, was the temporary substitute. (Record, page 18, 493). This lease is the "99 YEAR LEASE, which is the subject matter of this entire litigation. It was duly acknowledged and recorded on September 18, 1857. The consideration of this lease, while apparently but one dollar, was really $25,000, paid by the Pioneer Iron Company to Reynolds. Harvey by this 99 year lease "conveyed, assigned and set over" to the Pioneer Iron Company, "certain rights and easements" therein described, "(subject to the provisions and limitations thereto annexed)," in and upon certain pieces and parcels of land in Marquette County, a little over 648 acres in all, which land comprised the remaining part of the land which Harvey had acquired from Reynolds by the deed of February 26, 1857.

Inasmuch as the first clause of the granting part of the 99 year lease relates to the cutting and removing of timber on the land demised, which timber has long since been cut off, it is unnecessary to state here more than the second clause of the granting part of said lease, which relates to the minerals and marble on the land and which is as follows:

> "The party of the first part does hereby let, lease and demise to the party of the second part for the consideration hereinbefore mentioned, *and for the*

full end and term of 99 years from and after the date hereof, all the lands hereinbefore mentioned and all other lands now owned by party of the first part, in either of the townships above mentioned, for the sole purpose of mining and quarrying, at its own expense, such ore and marble as may be found thereon and subject to the provisions hereinafter mentioned, viz:

PROVIDED; It shall not quarry, mine or remove any ores on said lands, except such as *it shall actually convert into merchantable iron in its own furnaces or forges,* and provided further, it shall not in such mining or quarrying operations use or injure any of the improvements which may be placed upon said lands by other persons without paying just and equitable damages therefor; nor shall it occupy in such operations more land than is absolutely necessary to open and work successfully such mines of iron or marble as may be discovered. And it shall purchase and pay at the rate of $12 per acre for unimproved lands which it may require for such purposes. *The rights and easements above mentioned shall descend to the corporate successors of the party of the second part, but not to its assigns.* The party of the first part hereby agrees and binds himself in nowise to convey or encumber any of the lands hereinbefore mentioned except with a reservation of all rights and easements, hereby secured and intended to be secured to the party of the second part. All the above rights and easements are subject, however, to the terms of a certain deed and agreement accompanying the same, executed by James L. Reynolds and wife to the party of the first part on the twenty-sixth day of February, A. D., 1857, and recorded in Register's Office of said county in Liber B of Deeds, on page 381 and 382, to which record for further particulars reference is hereby made."

This 99 year lease was executed by Harvey, as grantor, and accepted by Harvey for the Pioneer Iron Company, grantee. (Testimony of Harvey, Record, page 493).

Although dated September 17th, it was part of the same transaction as the deed of April 22nd, with which it is to be regarded as contemporaneous. (Record, page 493).

It is also worthy of remark that the testimony shows that the tract of 3488 acres which *was deeded* by Harvey to the Pioneer Iron Company for five-sixths of the entire money consideration agreed to be paid by him to Reynolds, was not valuable for minerals; while it appears that the 674 acres which Harvey *did not convey* but leased to the Pioneer Iron Company, are valuable, as they contain substantially all the minerals subsequently discovered. (See testimony of Redfern, Record, page 115). This is very significant in view of the fact that Harvey (Record. page 491) was admittedly the agent of the Pioneer Iron Company in the entire transaction, and selling to that company all the valueless lands deeded to him by Reynolds for $25,000; he retained in himself individually the title to the valuable lands, giving to his *cestui que trust* only such rights in the ore thereon as were conferred by the 99 year lease. These admitted facts give neither Harvey nor his grantees good standing in a court of equity, as against the *cestui que trust*, with whom he made this unconscionable bargain.

In 1865 Harvey sold his stock in the Pioneer Iron Company to Samuel J. Tilden, and severed his connection with that company. (Record, page 492).

It appears from the record that the Pioneer Iron Company, having acquired the property above referred to from Harvey, and having erected a furnace in Marquette County, also acquired other properties and rights for use in its business. It is also undisputed on the evidence that the Pioneer Iron Company entered upon its estate, cut timber and mined for iron ore and that it carried on operations to a greater or

less extent from its organization until now, and is still actively engaged in the manufacture of pig iron within the limits of Marquette County as they existed at the time Reynolds gave his deed.

The Pioneer Iron Company.

As hereinbefore stated the Pioneer Iron Company was organized and a charter obtained by Harvey and his associates on April 22, 1857. (Record, pages 1 to 16). Its corporate powers being then by constitutional provisions, limited to the period of thirty years, to-wit, until April 22, 1887.

Provision was and is made by the law of Michigan as follows:—

> (8534) *Sec.* 8. "All corporations, whose charters shall expire by their own limitation, or shall be annulled by forfeiture or otherwise, shall, nevertheless, continue to be bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock; but not for the purpose of continuing the business for which such corporations have been or may be established."

Subsequently, before the extension of the Pioneer Iron Company by its reorganization, the constitution of Michigan was amended as follows:

> "*Art.* 15. *Sec.* 10. No corporation, except for municipal purposes, or for the construction of railroads, plank roads and canals, shall be created for a longer time than thirty years; but the legislature may provide by general laws, applicable to any corporations, for one or more extensions of the term of such corporations while such term is running, not exceeding thirty years for each extension, on the consent of not less than a two-thirds majority of the capital of

the corporation; and by like general laws for the corporate reorganization for a further period not exceeding thirty years, of such corporations whose terms have expired by limitation, on the consent of not less than four-fifths of the capital. Provided, that in cases of corporations where there is no capital stock, the legislature may provide the manner in which such corporations may be reorganized."

Thereupon, pursuant to this constitutional provision, before the reorganization of said company, the legislature of the State of Michigan duly enacted a statute of said state, providing as follows:

"(7035) *Section* 1. *The People of the State of Michigan, enact;* That it shall be lawful for any corporation heretofore or hereafter organized under the general laws of this state for mining, smelting or manufacturing purposes, whose corporate term has expired, or shall expire by limitation, at a special meeting of its stockholders called for that purpose, by a vote of at least four-fifths of its capital stock, to direct the continuance of its corporate existence for such further term, not exceding thirty years from the expiration of its former term, as may be expressed in a resolution for that purpose. Such meeting may be called in accordance with the by-laws of the corporation and the laws of this state applicable to the same class of corporations whose term has not expired by order of the directors *de facto* of the corporation. Upon the adoption of such resolution by a vote in person, or by proxy duly filed, of a majority of at least four-fifths of the capital stock, it shall be the duty of the president and secretary of stockholders' meeting to make, sign and acknowledge duplicate articles of association, as in the case of a new corporation, to which shall be appended a copy of the proceedings of such stockholders' meeting certified by the secretary and verified by his oath, which articles of association shall be filed with the

Secretary of State and with the County Clerk of the County where the corporation carries on its business, and be by both recorded in their respective offices, at the expense of said corporation; and the copies so filed, the record thereof, or a certified copy of either of such records shall be *prima facie* evidence of the facts therein recited; but said articles of association need not set forth in the case of corporations existing under the provisions of chapter one hundred and twenty-three of Howell's Annotated Statutes, the cash value of property conveyed to the corporation contemporaneously with its re-organization, nor the names of the directors for the first year; Provided, nevertheless, that this act shall not be applicable to any corporation whose term may expire after this act takes effect, unless its meeting be held within two years after such expiration; nor to any corporation whose business has been or may be wound up and property sold pursuant to the voluntary action of the stockholders or of any Court of competent jurisdiction; Provided, that no corporations, except corporations organized to carry on business in the counties of Houghton, Keweenaw and Ontonagon, shall be permitted to reorganize hereunder which for the past ten years have ceased to carry on the business for which they were organized.

(7036) *Sec.* 2. The renewed term of such corporation shall begin from the expiration of the former term thereof, and the corporation thus renewed shall hold and own all the property held and owned by the corporation before renewal, and shall be liable to all its debts, liabilities and obligations as fully as if the former corporate term had not expired; and the directors and officers who were such in fact at the time of the meeting, shall hold and continue in their offices until their successors shall be elected and shall qualify; Provided, nevertheless, that if the call for the meeting to extend the corporate term shall embrace a notice that a number of the directors will be elected at such meeting, such election may be

then held accordingly, and the directors then elected shall, when they shall qualify, become and be the directors of such renewed corporation."

Under this law the Pioneer Iron Company took the necessary steps and proceedings and duly reorganized said corporation, thereby extending its charter for another period of 30 years from April 22, 1887.

Certified copies of the records of the Secretary of the State of Michigan were introduced in evidence. (Record, pages 295-303, also pages 517-545).

To be sure it is claimed by defendants in error that there were defects in the first reorganization; but such defects, if they existed, were all cured by amendment to the articles of incorporation of the reorganized company and by subsequent action of its stockholders and directors. And even if this were not so, the fact of the existence of such errors, if any there were, could not affect the grant covered by the 99 year lease,—which would not lapse,—but under the terms of the lease *would descend* to any company organized as *the corporate successor* of the Pioneer Iron Company,—or until such company was organized, or the Pioneer Iron Company was effectively reorganized, — would remain in the directors of the Pioneer Iron Company.

The State of Michigan never thereafter questioned the legality or validity of such reorganization, or the continued corporate powers or existence of said company or its right to continue in its transaction of business. It was shown beyond dispute that the Pioneer Iron Company continued in active and extensive business, not only before, but after the year 1889, and up to the present time, not only in the ownership, management, conveyance and control of its landed property, but in the active operation of furnaces within the then limits of Marquette County which are owned and operated by it. (Record pages, 102, 369, 375, 382, 384, 385, 386, 387, 392, 400, 404).

Record, page 369. It is shown that the Pioneer Iron Company was executing options and mining leases.

Record, page 375. Is an important contract between the Pioneer Iron Company and the Arctic Iron Company, dated September, 1889.

Record, pages 382-384. Is a list, about one hundred and forty, deeds and conveyances, extending from the year 1873 continuously down through the year 1896.

Record, pages 386, 387. Is the deed of conveyance of a furnace at Marquette, from the Carp River Furnace Company to the Pioneer Iron Company, dated January 3, 1900.

Record, page 400. Shows a deed executed by the Arctic Company to the Pioneer Iron Company, dated September 14, 1889.

Record, page 404. Shows the proceedings and expenses in a tax case, in which, in the year 1899, the Pioneer Iron Company was interested together with complainant Edward N. Breitung.

On *Record, page* 102 is a copy of the two notices given by complainants in this suit, directed to the Pioneer Iron Company, — all conclusively showing the recognized and actual corporate existence of the company as a going concern under the laws of Michigan.

By the terms of the 99 year lease it was provided that:

> "The rights and easements above mentioned *shall descend to the corporate successors* of the party of the second part, but not to its assigns," (Record page 20.)

The Pioneer Iron Company, as so recognized and extended, continued to assert its right in said lease, — *it being the sole and only party interested therein, and more than fifty years of said term having yet to run when this suit was brought.*

ASSIGNMENT OF ERRORS.

Plaintiffs in error claim that the Supreme Court of the State of Michigan erred in the following particulars, to-wit:

First.

Said Supreme Court of the State of Michigan erred in sustaining and affirming the decree and judgment of the Circuit Court for the County of Marquette, Michigan, wherein and whereby said Circuit Court found, determined, adjudged and ordered that the 99 year lease executed by Charles T. Harvey to the Pioneer Iron Company had been and was terminated and destroyed, and that defendants below, and each of them, whether acting in their individual or representative capacities, immediately vacate and remove from the lands in question (covered by said 99 year lease); and perpetually enjoining said defendants and each of them from further entering upon said lands for the purpose of exploring for or taking therefrom any minerals or iron ore for any purpose whatever, — for the reason that said Pioneer Iron Company had not been made or become a party to said suit and was not heard in defense of its property or rights. The property of said Pioneer Iron Company and of its stockholders was thereby TAKEN WITHOUT DUE PROCESS OF LAW.

Second.

Said Supreme Court of Michigan erred in finding, adjudging and decreeing,—and, by the affirmance of said judgment and decree of the Circuit Court of Marquette County,— in holding that said 99 year lease so executed to the Pioneer Iron Company by Charles T. Harvey was terminated, — said Pioneer Iron Company not having been made a party to said

action, or having an opportunity to be heard in defence of its rights to said property, — BY REASON OF WHICH THE PROPERTY OF THE PIONEER IRON COMPANY AND OF ITS STOCKHOLDERS, PLAINTIFFS IN ERROR, WAS TAKEN WITHOUT DUE PROCESS OF LAW.

Third.

Said Supreme Court of Michigan erred in determining and deciding that the Circuit Court of Marquette County, Michigan, and said Supreme Court of Michigan could by their respective judgments terminate the 99 year lease executed by Charles T. Harvey to the Pioneer Iron Company and could cancel the same as a cloud upon the title of complainants in said suit, and that it had jurisdiction to adjudge the same to have been destroyed and terminated, — without the presence of the Pioneer Iron Company as a party to said suit.

Fourth.

The action of said Supreme Court of Michigan, *in affirming in all things the judgment and decree of the Circuit Court of Marquette County, Michigan,* and thereby adjudging and decreeing the 99 year lease so executed by Charles T. Harvey to the Pioneer Iron Company, and the rights of said company therein and thereunder, to be cancelled and terminated; ordering that defendants below, officers and stockholders of said corporation in their individual *and their representative capacities,* vacate the property in question and perpetually enjoining said defendants below as aforesaid from entering upon said lands for the purpose of exploring for or taking therefrom any minerals, or iron ore, or for any purpose whatever; and further thereby finding and adjudging that the corporate term of existence of said Pioneer Iron Company expired April 22, 1887, — said Pioneer Iron Company not being a party to said

suit, — IS REPUGNANT TO AND IN CONFLICT WITH ARTICLE 14, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES, which declares: "That no State shall make or enforce laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any citizen of life, liberty or property without due process of law" — in that such decree and adjudication cuts off, destroys and extinguishes large property rights and interests of said Pioneer Iron Company, and through it the value of the capital stock of said company held by plaintiffs in error, and thereby cuts off and destroys the franchises, rights and interests of said company, granted to it by the State of Michigan, whereby the interests and property rights of its stockholders are diminished and destroyed, — ALL WITHOUT DUE PROCESS OF LAW.

THE ARGUMENT.

The relation of the stockholders of a corporation to the corporate property is such that if by judgment of the courts of Michigan the property of the Pioneer Iron Company was cut off, destroyed or diminished in value, it must follow of necessity that the value of the stock of that company was thereby diminished and taken away.

The value of the stock in a corporation is dependent absolutely upon the extent, value and incomes of its property; —the corporate property after payment of debts being in equity held and owned in trust for the stockholders.

> "Though the title to the property of the corporation is in the corporation and not in the stockholders, the stockholders are undoubtedly interested therein; though the title is in the corporation, the beneficial interest is in the stockholders in proportion to their shares."

"For the same reason a stockholder is interested in an action by or against the corporation, although not technically a party thereto, etc., etc."

1 *Clark & Marshall on Corporations*, Sec. 7, p. 23.

If, therefore, by the judgment complained of, the 99 year lease, the property of the Pioneer Iron Company, was set aside and thus destroyed and terminated, the value of the shares of stock in that company was diminished and taken away by the same judgment, exactly to the extent of the value of the lease.

That the effect upon the stockholders was indirect, does not at all vary the principle. Their property is none the less "taken," if its value is impaired.

Railway Co. v. Minnesota, 131 U. S., 458;
Gas Lt. & Coke Co. v. Cleveland, 71 Fed. R., 614.

Even though the stockholders were themselves made parties to the suit as individuals, yet they had no power as such to appear for and represent the corporation; and could not, therefore, defend their corporate property.

Brunson v. Railway Co., 2 Wall., 301, 302, 303;
Ex parte Cutting, 94 U. S., 92;
Shoe & Leather Co. v. Kurtz, 34, Mich., 88;
Talbot v. Scripps, 31 Mich., 268;
1 *Thompson on Corporations*, Secs. 1071, 1080;
6 *Thompson on Corporations*, Sec. 7570, 7579.

In *Land & Cattle Co. v. Frank*, 148 U. S., 603 (see opinion, 610), this Court held that in all litigation, the result

of which must affect the property and rights of a corporation, such corporation itself, though it has ceased to do business, is an indispensable party. The Court in that case, in its opinion, page 610, say:

> 'The stockholder defendants who have been served with process and entered their appearance do not undertake to represent and cannot in any way represent the corporation against whom the claim for damages is asserted."

It therefore follows that if the property of the Pioneer Iron Company, in its absence, was wrongfully taken *without due process of law* as against the corporation, the property of the stockholders who are here plaintiffs in error was also taken *without due process of law.* Even though they as individuals were parties to the suit in which their stock in the corporation was "taken" or injuriously affected, — yet "due process of law" was lacking, if legal defence of their property was impossible; or, which is the same thing, if no opportunity to make the defence was legally accorded the corporation itself. For the purposes of *representation* and *defence* of the corporation they were as powerless as though not parties.

Where the corporation or its property are the subject of attack in court, the stockholders have the constitutional right to be represented and to defend in such suit through the corporation itself by its officers and directors.

Minnesota v. Northern Securities Co., 184 U. S., 199, see opinion 245, 246.

Therefore, the constitutional rights of the plaintiffs in error, and the question whether the same have been violated by the judgment complained of, will be completely determined

by a determination of the rights of the corporation and the effect of this judgment upon the property of said corporation.

The question here presented then is this: WAS THE PROPERTY OF THE PIONEER IRON COMPANY, BY THE JUDGMENT COMPLAINED OF, "TAKEN WITHOUT DUE PROCESS OF LAW"? COULD THE RIGHTS OF THE PIONEER IRON COMPANY IN THE 99 YEAR LEASE BE LITIGATED AND DECIDED IN A SUIT TO WHICH IT WAS NOT A PARTY, WITHOUT VIOLATING THE CONSTITUTIONAL GUARANTY? COULD THE COURTS OF MICHIGAN, IN SUCH A SUIT, AND IN THE ABSENCE OF THE PIONEER IRON COMPANY, LEGALLY PROCEED TO FIND AND ADJUDGE THAT THE LEASEHOLD RIGHTS OF THAT COMPANY HAD TERMINATED, AND PERPETUALLY ENJOIN ITS STOCKHOLDERS, OFFICERS AND AGENTS FROM GOING UPON THE PROPERTY FOR THE PURPOSE OF OPERATING UNDER SUCH LEASE?

The bill of complaint filed in the state courts admits that the 99 year lease *was granted to the Pioneer Iron Company, and to it only.* If that lease is now owned by any person, that owner is the Pioneer Iron Company. The lease itself has 50 years to run, and by its terms it was made to *descend to the corporate successors of the Pioneer Iron Company.*

The record shows, that the Pioneer Iron Company was reorganized under the laws hereinbefore set forth; that its corporate powers were extended; that it has been actively engaged in business and has ever since been and to this present time is recognized by the State of Michigan.

The Law of Michigan provides that the corporation as reorganized shall continue to hold and own the corporate property; hence, the Pioneer Iron Company as extended and reorganized and as now existing,—is either the original corporation with its corporate existence extended, or it is the successor to the original corporation; and in either case it holds and owns the 99 year lease. (*Webster's Dictionary; Clark & Marshall on Corporations,* Secs. 335, 341, defining the term "successor.")

Under these facts, the question is: Could this valuable existing leasehold, which was granted to and owned solely by this corporation, be by judicial act terminated and cut off in a suit to which said company was not made a party, — without a direct and palpable violation of the constitutional provisions protecting it and its stockholders?

It is no answer to the proposition above made, that the Pioneer Iron Company at the end of other litigation might not be held bound by the decree in a suit to which it was not a party, for in this case it is manifest that it was impossible to frame a decree *determining the rights of the parties before the court without necessarily determining and affecting the rights and interests of the Pioneer Iron Company.* The granting of any of the remedies prayed for, presupposed the termination of the 99 year lease and the property rights of the Pioneer Iron Company therein, or at least, such an interference as to impair and destroy the value and the use of the leasehold.

To hold and adjudge the lease forfeited or inoperative because of past acts of the Company, or because it should be found to be appurtenant to a furnace since abandoned,—or because of the determination, for any reason, that such lease did not continue and remain the property of the Pioneer Iron Company as reorganized, or to grant the injunction prayed for,—would, in case such judgment be given force, necessarily destroy the value of this leasehold and cut off the uses of the

same by the Pioneer Iron Company. *Such was the judgment asked.*

What was in fact the course and result of *the litigation as actually carried forward?*

Complainants below alleged in their bill that said lease was in fact granted to the Pioneer Iron Company; that by reason of acts and defaults of that company said lease was terminated, — but that defendants were wrongfully asserting and exercising rights in the premises, claiming to act under said lease for said company.

All the defendants below by their answers and subsequent proof disclaimed that in asserting the right to mine upon said premises under the 99 year lease, they were acting personally, or that they acted otherwise than as officers and agents of the Pioneer Iron Company; and they disclaimed all interest in said leasehold except on behalf of said company.

The question, therefore, as to whether defendants might mine iron ore upon the property, depended on whether the Pioneer Iron Company, as reorganized and extended, still owned the 99 year lease, and still had the right to mine under its terms. If the lease were valid and in force so that the Pioneer Iron Company had under it the right to mine, defendants, officers of said company, could not be trespassers in asserting its right to mine. Only by finding this lease to have terminated, — only by extinguishing the rights of the Pioneer Iron Company therein and thereunder, could the injunction prayed for be granted against the officers and agents of said company.

Upon this issue the case was actually heard; and the record discloses that the evidence offered by complainants below was all directed to an attack upon the rights of the Pioneer Iron Company under said lease.

THE CIRCUIT COURT OF MARQUETTE COUNTY TREATED THIS AS THE ISSUE BEING TRIED, — and the decree, (which

was subsequently affirmed in the Supreme Court), was based upon findings and determinations of the rights of the Pioneer Iron Company under said lease; and it is concluded with a perpetual injunction restraining the defendants and each of them, whether acting in their *individual or in their representative capacity,* from entering upon the lands covered by the lease for the purpose of exploring or taking therefrom any mineral or iron ore, or for any purpose whatever, without the consent of complainants.

The rights and interests of the Pioneer Iron Company in said leasehold were thereby completely found and adjudicated; and the stockholders, officers and agents who might represent it in asserting those rights were, by order of the court, perpetually enjoined from so doing. Even though technically the Pioneer Iron Company might go into other litigations with the hope of setting aside the judgment so rendered, and establishing its leasehold rights, yet its officers and agents are in the meantime, by the decree complained of, stopped from mining and obtaining iron ore; and while complainants below are carrying forward their mining operations and depleting the ore from the property, years of this valuable leasehold are practically, *by said decree and injunction, cut off from the term of the lease.* It is therefore apparent that even should the Company seek to regain its rights by litigation, its business connected with its mines is in the meantime effectually stopped and the term of the lease is by the decree and injunction complained of, actually shortened and its value diminished, and this regardless of the ultimate result of any such other litigation.

Even assuming that the company may attempt to regain its rights by another suit, — yet under the holdings of the Supreme Court of Michigan, affirming the decision of the Circuit Court, and the conclusions of fact and law already announced in this case,that company would meet the practical

proposition that its rights had been already adjudicated and determined.

It is perfectly clear that as the result of the decision complained of the property of the Pioneer Iron Company has been swept away, in a suit to which it was not a party.

THE LAW.

It is the settled law, firmly established by a long line of the decisions of this Court and of other Courts of the United States that:

(1) A court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit, without affecting those rights.

Shields v Barrow, 17 Howard, 130, 141;
Mallow v. Hinde, 12 Wheaton, 198;
California v. Southern Pacific Co., 157 U. S., 229-248, 251;
Minnesota v. Northern Securities Co., 148 U. S. 199-237;
Water Co. v. Babcock, 76 Fed. Rep., 243, 248, 249, 252.

(2.) Where the rights of a party before the court depend upon the rights of a party not before the court, an adjudication between parties to a suit which involves or affects and thereby determines the property rights of such persons who are not before the court, violates the constitutional provision, preventing the taking of property without due process of law.

Taylor & Co., v. Southern Pacific Co., 122 Fed. Rep., 147, 152;
Water Works v. New Orleans, 164 U. S., 480;
Pennoyer v. New, 95 U. S., 714, 733;
Windsor v. McVeigh, 93 U. S., 264-277.

In the case of *Mallow v. Hinde*, 12 Wheaton 193, (see opinion 198), one Campbell had by will devised his land warrants and military rights to Taylor in trust for the children of Sarah Beard. It was alleged that Taylor, the trustee, while holding the legal title to the property devised, permitted the Beard children to take the management of such property themselves, and that said children entered into executory contracts with Mallow and others for the sale of said lands.

Mallow and others who claimed to have rights under said contracts with the Beard children began this action against one Hinde, who claimed the same land as purchased from Taylor, the trustee. The complainants asked that their equities and contract rights in said land be established by decree and that Hinde be perpetually enjoined from enforcing certain judgments of eviction which had theretofore been obtained against complainants. The children of Sarah Beard were not made parties to the action.

Objection was made that the proper parties were not before the Court; that since complainants could claim title to the land only under the executory contracts with the Beards and be means of a decree enforcing said contracts, it was evident that the Beards should be in court as parties and should be heard before any decree could be rendered.

This Court in answer to the contention in behalf of complainants that a decree could be entered *between the parties to the suit* regardless of the Beards, said:—

> "This doctrine was applied to the case where a small interest was outstanding in one not before the court as tenant in common; each of their rights stood upon its own independent basis; and the ground upon which it was necessary according to the general principle to have both before the court, was to avoid a multiplicity of suits and to have the whole matter settled at once.
>
> In this case the complainants have no rights separable from and independent of the rights of per-

sons not made parties. The *rights of those not before the Court lie at the very foundation of the claim of right by plaintiffs and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.*

We do not put this case upon the ground of jurisdiction, but upon a much broader ground which must equally apply to all Courts of equity whatever may be their structure as to jurisdiction; *We put it on the ground that no Court can adjudicate directly upon a person's rights without the party being either actually or constructively before the Court."*

The Court thereupon remanded the case to the Circuit Court with directions to dismiss the bill.

In the case now at bar, it has been shown that the right to any remedy against the defendants, depended entirely upon a determination of the rights of the Pioneer Iron Company in the 99 year lease. The rights of that company, (which was not before the Court or a party to the suit) " were at the very foundation of the claim of right by the plaintiffs, and a final decision could not be made between the parties without directly affecting and prejudicing" the rights of the Pioneer Iron Company.

In the case of *Shields v. Barrow*, 17 Howard, 130, (see 141). Barrow had entered into a certain contract of compromise with Shields and numerous other persons. Barrow brought suit against Shields, and a part, but not all, of the parties to the contract in question, and asked that said contract be rescinded and annulled and for other relief.

Objection was made on the ground that indispensable parties were not before the Court, and it was claimed that the contract being entire, no decree of rescission could be entered in absence of any of the parties who executed it.

In the consideration of the case the Court discussed and pointed out the principles applicable to the various classes of parties to a suit in equity, calling attention to those "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." These persons the Court declared to be indispensable parties. After quoting with approval the language used in *Mallow v. Hinde*, above set out, the Court say, on page 141:—

> "It remains true, notwithstanding the Act of Congress and of the 47th Rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

The Court thereupon reversed the case and remanded the same with direction to dismiss the original and the cross bill.

The case of *Minnesota v. Northern Securities Company*, 184 U. S., 199 (see 245-6), in a case directly in point.

The owners of a majority of the stock of the Great Northern Railway Company and of the Northern Pacific Company had organized a separate corporation known as "The Northern Securities Company," to which a majority of the stock of the Great Northern Railway Company and of the Northern Pacific Railway Company had been transferred, in claimed violation of the law of Minnesota.

Suit was brought by the State of Minnesota against the Northern Securities Company, as defendant, to prevent by in-

junction the holding and voting of said stock, and the entire plan of said claimed illegal consolidation.

Neither the Great Northern Railway Company nor the Northern Pacific Railway Company were made parties to the suit. This Court in holding that said absent corporations were indispensable parties, without whose presence the controversy could not be determined, reviewed the decisions herein cited, and used the following language, beginning on page 245:—

> "But it is not alleged that the stockholders of the Northern Securities Company constituted or are composed *of all the stockholders* of the two railroad companies, and in fact the contrary is conceded in the allegations of the bill that a majority only of the stock of one or perhaps both of the two railroad companies is owned or at least controlled and managed by the Northern Securities Company."
>
> "It is obvious, therefore, that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company. They have the right to be represented in the controversy by the companies whose stock they hold and their rights ought not to be affected without a hearing even if it were conceded that a majority of the stock in such companies held by a few persons had assisted in forming some sort of illegal arrangement,"

also the following:—

> "Not only have the stockholders, be they few or many, a right to be heard through the officers and directors whom they have legally chosen to represent them, but the general interests of the public, which might be deeply affected by the decree of the Court, are entitled to be heard; and that, when the State is the complainant, and in a case like the present, can only be effected by the presence of the railroad companies as parties defendant."

The case of *California v. Southern Pacific Co.*, 157 U. S., 229, (see opinion 248 and 255), was instituted on behalf

of the state to obtain an adjudication of the rights of the state in a certain water front in and connected with the town of Oakland. The grants of said water front had been made by the state to the City of Oakland, and from Oakland to various other parties. Neither the City of Oakland nor certain of the other grantees were made parties to the suit.

The prayer of the bill was, among other things, "for a decree adjudging that the state could not make such a grant to the town; that the Town of Oakland had no authority to grant or convey all its water front or any part thereof, and that any control conferred on the town by the Act of 1852 was annulled by the Act of 1854."

Objection was made that various parties whose rights would be affected by such a decree were not before the Court as parties. It was thereupon claimed for the state that the decree could be made and relief granted, but it would be confined to the property owners who were before the Court and that "*the decree would not bind those claiming interests in other parts of the water front.*"

It will be observed that the foregoing contention is identical with that made relative to the Pioneer Iron Company and its stockholders as to the effect of the judgment of the Courts of Michigan,—it being the claim of defendants in error here that even though the judgment purports to sweep away and terminate the 99 year lease, it should not be held to affect the rights of the Pioneer Iron Company,—said company not being a party to the suit.

This Court, (in *California v. Southern Pacific Railway Company., supra*), in passing upon the contentions of the state, reviewed, (pp. 248-251), the former decisions and line of authority hereinbefore referred to, and said, (page 255):—

> "Considered, however, with reference to the main contention of the state, namely, *the want of power to make the grant of the entire water front at*

all, the argument treated the water front as one and indivisible for the purpose of the case, etc."

"Irrespective, then, of the extent, technically speaking, of the effect and operation of a decree as to the seven parcels based on that ground as *res adjudicata*, it is impossible to ignore the inquiry whether the interests of persons not before the Court would be so affected and the controversy so left open to future litigation as would be inconsistent with equity and good conscience."

"If this Court were of opinion that the City of Oakland occupied the position of the successor merely of the Town of Oakland; that the grant of the water front to the town was as comprehensive as is claimed by defendant, and that it had not been annulled by any act of the legislature, but also held that the State had no power to make such grant, *then the City of Oakland, would be deprived of the rights it claimed under the grant, not by the exercise of the legislative power of the State as between it and its municipality, but by a judicial decree in a suit to which the city was not a party.*"

"*And if the proceedings which purported to vest title in the Oakland Water Front Company were held ineffectual for the same reason, then the latter company would find the foundation of its title swept away in a suit to which it also was not a party.*"

The bill was thereupon dismissed.

A review of this entire line of decisions is also found in *Water Co. v. Babcock*, 76 Federal Reporter, 243, 248, 249, 252.

The principles announced in the foregoing decisions are also adopted as the ground of the decision in the case of *Land & Cattle Co. v. Frank*, 148 U. S., 603, (see opinion 610, 611). In that case suit was brought against the stockholders of a corporation, it being alleged that the corporation had distributed all its property to the stockholders and had ceased and suspended business. It was the claim that the stock-

holders were the real parties in interest; that as the corporation had turned over to them its property, they in fact and in law represented such corporation, and that it was not necessary that the corporation itself be made a party to the suit. This Court held, page 610, that:

> "The stockholders defendants, who have been served with process and entered their appearance, do not undertake to represent, and cannot in any way represent, the corporations against whom the claim for damages is asserted."
>
> "Now, it is too clear to admit of discussion that the various corporations charged with the fraud which has resulted in damage to the complainant are necessary and indispensable parties to any suit to establish the alleged fraud and to determine the damages arising therefrom * * *"

also:

> "Stockholders cannot be required to represent their corporations in litigation involving such questions and issues. The corporations themselves are indispensable parties to a bill which affects corporate rights or liabilities."

The Court thereupon proceeded to base the case upon:

> "The general rule that suits in equity cannot be entertained and decrees be rendered, when necessary or indispensable parties, whether corporations or individuals, are not brought before the Court."

As authority for this holding the Court cites, among other cases, *Shields v. Barrow*, 17 How., 130, 141, above referred to. The case was thereupon remanded with directions to dismiss the bill, etc.

In the case of *Taylor & Co. v. Southern Pacific Co.*, 122 Federal Reporter, 147, a suit was brought to enjoin the voting of certain stock at the election of directors of the Southern Pacific Co., it being the contention that the stock in question was illegally claimed to be owned and held by the

Union Pacific Railroad Company,—the Union Pacific and the Southern Pacific Companies being competing transcontinental lines,—and it being averred that the stock so owned by the Union Pacific was acquired for the purpose of dominating the operations of the Southern Pacific Company.

The Union Pacific Company was not served and did not appear as a party to the action. The absence of the Union Pacific Company was urged as a fatal objection to the maintenance of the bill and to granting any relief in the case; but it was replied that relief could be given against the parties who were before the Court, binding their intersts alone, and especially against the Southern Pacific Company.

Judge Lurton, in an opinion of great strength and clearness, said, on page 152:—

> " The direct effect of any such decree upon any of the theories upon which I am asked to act, would be to deprive the Union Pacific Railroad Company of one of the most valuable of the incidents of its ownership of its Southern Pacific shares,—the right to vote for managing directors at a meeting of stockholders. It is, therefore, according to every definition, an indispensable party to any bill which challenges its right to own or vote upon its Southern Pacific shares." " *It must be accepted as altogether fundamental that no Court can adjudicate upon the rights or interests of one who is neither actually or constructively before the court. The principle of due process of law unconditionally compels observance of the rule which limits the just jurisdiction of every Court to a determination only of the rights of persons who are parties to the litigation.*"

This doctrine is expressly based upon the authorities hereinbefore cited. Among other decisions, Judge Lurton discusses and cites *Mallow v. Hinde,* 12 Wheaton, 193, 198, and *Minnesota v. Northern Securities Company,* 184 U. S., 199. He also cites the case of *New Orleans Water Works v. New Orleans,* 164, U. S., 471, (see opinion 480).

In *New Orleans Water Works v. New Orleans,* it was alleged that certain rights which had been granted to various persons by ordinances of the City of New Orleans were in violation of the rights and privileges of the New Orleans Water Works Company. The persons for whose benefit the ordinances had been passed, and to whom the rights complained of had been granted, were none of them made parties to the suit. The plaintiff sought by decree to have the ordinances declared null and void and to require the same to be expunged, repealed and cancelled so far as they affected the complainant.

It was objected that necessary and indispensable parties were not before the Court and that by the decree prayed for their property would be taken without due process of law.

The Court, passing upon the questions raised, said, (page 48):—

> "We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances, for in the absence of the parties interested, and without their having an opportunity to be heard, the Court would be without jurisdiction to make an adjudication affecting them. *Such a decree would appear upon the very face of the record not to be due process of law and could be treated everywhere as a nullity.*"

The same principle is found decided in *Pennoyer v. New,* 95 U. S., 714, see 733; also *Windsor v. McVeigh,* 93 U. S., 274, see 277.

It is unnecessary to multiply cases further; they are uniform in sustaining the principle on which we rely, namely, that a judgment or decree which necessarily involves and adjudicates the rights of persons who are not parties to the suit, —the enforcement of which judgment against the parties to the suit results in enforcing it against such absent person,—is

in violation of the constitutional rights of such absent person and is an adjudication without due process of law.

Applying that principle here, there is no escape from the conclusion that the rights of the Pioneer Iron Company in the 99 year lease have been adjudicated,—and so "taken" in its absence without due process of law.

The decree complained of directly and in terms declares that the 99 year lease no longer exists as the property of the Pioneer Iron Company;—and its officers are thereby enjoined perpetually from asserting its rights therein. It is no answer to say that the individual defendants may be and are bound by this adjudication, but that the corporation may not be technically affected, because not a party to the judgment. None of the defendants had or claimed or were shown to possess any rights in this lease except such as were wholly dependent upon and involved in the rights of the Pioneer Iron Company; and the *enforcement of the perpetual injunction* complained of against the defendants individually and *in their representative capacity*,—necessarily involves the enforcement of that injunction, through them, against the Pioneer Iron Company itself. Its rights can only be available and valuable to it to the extent that they may be asserted and made useful through its agents and officers. These officers and agents are now enjoined from acting.

CLAIMS OF DEFENDANTS IN ERROR.

Defendants in error deny the *jurisdiction of this* Court to hear and determine the questions here raised, because they assert:

(1.) That the federal question here relied on was not set up and claimed by plaintiffs in error who were and are stockholders of the Pioneer Iron Company;

(2.) They further claim that the judgment complained of was based upon non-federal questions.

First.

Considering first the contention THAT THE FEDERAL QUESTION HERE INVOLVED WAS NOT RAISED ON BEHALF OF A STOCKHOLDER OF THE PIONEER IRON COMPANY, —we answer that the pleadings, the evidence and the decisions of the courts of Michigan, as shown by the Record, clearly refute this contention.

As hereinafter shown, the constitutional right now relied on was by answer in the Michigan Courts explicitly set up and claimed by William G. Mather in his own right, and as trustee for the Iron Cliffs Company,—both of said parties being stockholders of the Pioneer Iron Company.

The Record shows that ten shares of the stock of the Pioneer Iron Company belonged to William G. Mather personally and stood in his name, and that 3930 shares belonged to the Iron Cliffs Company, and stood in the name of William G. Mather as trustee. The exact proportions in which this stock was so owned were proved and the Court knew the facts. (Record, pages 517, 518, and pages 531, 534, 535 and 539).

Record, page 52 the answer of Mr. Mather sets forth that he owns said stock individually and as trustee.

Record, page 344, James H. Hoyt testified that in the year 1891 William G. Mather was President of the Pioneer Iron Company. This, of course could not have been true unless he was a stockholder.

On Record, page 350, Mr. Hoyt further testified that "the stock of the Pioneer Iron Company was held by William G. Mather, — the larger proportion of it as trustee, for a good many years.

Record, pages 517, 518, the exact holding and ownership of the stock of the Pioneer Iron Company in the year 1890 is shown by the amended articles of association of said company, taken from the books of the Secretary of State of Michigan. These books show that Mr. Mather owned:—

Individually	10 shares.
As Trustee	4930 shares

The 4930 shares being equitably the property of defendant the Iron Cliffs Company, as testified by Mr. Hoyt.

Record, pages 531, 534, 537, 539, it is shown that on April 6, 1901, Mr. Mather yet owned:

Individually	10 shares
As Trustee	3930 shares

The stock so held as trustee being the property of the Iron Cliffs Company, it having been testified that 1,000 shares had been sold during the ten years to Mr. Hale, General Garretson and others who were not parties to the suit.

The following holdings of such persons who were not parties, the Record shows (page 531) were as follows:—

E. V. Hale	Held 950 shares
George A. Garretson	Held 50 shares
Peter White	Held 10 shares
E. R. Perkins	Held 10 shares
Fred. A. Morse	Held 10 shares
J. H. Sheadle	Held 10 shares
James H. Hoyt	Held 10 shares
J. H. McBride	Held 10 shares

It is further shown (Record, page 555) that during the trial and argument of the case complainants by their counsel asserted the ownership of this stock by William G. Mather, *insisting that he was President of the Pioneer Iron Company, which would necessarily require the ownership of stock;* and further *insisting that he held stock as trustee for the Iron Cliffs Company.*

Nowhere does the record show a finding against Mr. Mather's ownership of this stock; on the contrary the fact of his ownership was assumed and practically, although not in so many words, found and determined by the Courts.

In addition to the foregoing and corroborative of the fact that the Michigan Courts as well as counsel for complainants were satisfied that defendants, who raised this federal question, were stockholders of the Pioneer Iron Company,—is the fact that on December 3, 1903, *the judges of the Supreme Court of Michigan,* after due consideration, allowed the writ of error herein, (Record, page 581), to this court; which but for the ownership of said stock and the fact that said federal question had been raised, would not have been done.

Federal Question Explicitly Set up and Claimed.

The exact rights which we are now asserting were set up and claimed in the Circuit Court of Marquette County, Michigan, by amendment to the answer filed by defendants, *which amendment was especially allowed by the Court for the very purpose of permitting the contention which we now make.*

On Record, page 52, in the amendment to the answer of William G. Mather, The Iron Cliffs Company and The Cleveland-Cliffs Iron Company, the following explicitly appears:—

> "And this defendant, William G. Mather, answering for himself, says that he owns *in his own right and as trustee* 3940 *shares of stock of said company* and that if any decree be rendered in this case by the Court in any way declaring a forfeiture or

> termination or expiration of said 99 year lease, or in any way affecting the rights of the Pioneer Iron Company thereunder, that said Pioneer Iron Company not being made a party to this proceeding, he as such stockholder and said Pioneer Iron Company would thereby be deprived of his and its property without due process of law, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, which forbids any State to deprive any person of life or liberty or property without due process of law, and this defendant avers that any decision or findings of the Court in any way limiting, terminating, changing, modifying, annulling or diminishing the value of any of the rights of the Pioneer Iron Company under said 99 year lease and as expressed therein would be void and of no effect under said provision of said amendment to the Constitution of the United States."

Thus explicitly invoking and claiming in behalf of all the stock so held by Mr. Mather, — (both for himself and the Iron Cliffs Company), — the protection of the federal constitution and the fourteenth amendment of the same.

It cannot be important *as to the method adopted to raise and assert this question* in behalf of these two stockholders who were the only stockholders of the Pioneer Iron Company who were made parties, since the state Courts were explicitly advised that the same was so raised. Again, the claim was also asserted for those stockholders by counsel in argument and by brief in their behalf, which alone would have been sufficient. How could this constitutional right be claimed and pleaded more strongly for the Iron Cliffs Company than by the trustee, holding in his own name these shares of stock?

> "Although no particular form of words is necessary to be used in order that the federal question may be said to be involved, within the meaning of the cases on this subject, *there yet must be something in the case* before the state Court which would at least

call its attention to the federal question as one that was relied on by the party, etc."

Bridge Co. v. Illinois, 175 U. S., see opinion 634.

That the Circuit Court of Marquette County clearly understood that this question was raised in behalf of all defendant stockholders, not only appears from the fact that after the evidence was closed the Court permitted this answer to be amended for the very purpose of claiming this federal question in exact and explicit form, — but it is also plainly evident from the opinions of both the Circuit and the Supreme Court of Michigan.

The Circuit Court in its opinion, (Record, pages 554, 555), says: —

"It is contended in behalf of the defendants that in any event the complainants are not entitled to a decree without making the Pioneer Iron Company a party to the suit;"

also on page 555:—

"They (complainants) also contend that the Pioneer Iron Company would be bound by the decree without making it a party, — for the reason that William G. Mather was the President of the company and the holder of a large majority of its stock as trustee for defendant, The Iron Cliffs Company."

Said Court found that it was not necessary to make the Pioneer Iron Company a party defendant.

In the Supreme Court the same right was asserted in behalf of said stockholders. The Court in its opinion says, (Record, page 569):—

"It is also urged as a fatal objection to the maintenance of this bill that the Pioneer Iron Company is not made a party."

Answering this the Court say, (Record, page 569):

"The defendants own, and have owned for many years, all its capital stock, etc., etc."

The Court, for the reasons stated, was clearly in error

in this statement, as more than 1000 shares were owned by persons not parties. See list of stockholders, page 44, *supra.*

We do not here purport to embody all the language of the Supreme Court, but sufficient only to indicate that the constitutional right was being claimed on behalf of all defendant stockholders. Said Supreme Court also on the same page determined that "The Pioneer Iron Company therefore was not a necessary party.'

It thus appears that the constitutional right was set up and claimed in behalf of said stockholders and was understood by both Courts and counsel for defendants in error to be so raised.

The decision of the constitutional question was also necessarily involved in the decision of this case; and the conclusion that the Pioneer Iron Company was not a necessary party to the suit is a square holding upon this exact question.

In *Water Co. v. Canal Co.*, 142 U. S., 254, see opinion 268, the Court say:—

> "This Court has frequently had occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State Court."

It has been also held by this Court that the federal question "*is sufficiently set up and claimed*" *if such federal question was fully considered in the opinion of the Court and was ruled upon against the plaintiffs in error.*

Land & Water Co. v. San Jose Ranch Co., 189 U. S. 177-180.

From the foregoing it appears beyond doubt not only that the federal question here asserted was set up and claimed in the Courts below in behalf of these stockholders in explicit form, but that the Courts of Michigan understood such claimed right to be asserted and ruled upon the same adversely to the plaintiffs in error.

Second.

Answering the contention of defendants in error, THAT THE JUDGMENT COMPLAINED OF WAS BASED UPON NON-FEDERAL QUESTIONS, we have to say that such claim cannot be sustained as *matter of fact*. This will be manifest from an examination of the decree of the Circuit Court of Marquette County, which was affirmed in the Supreme Court.

Even though it may be conceded that in a controversy in which there was a non-federal question sufficient to sustain a judgment *as against parties to the suit*,—and if a federal question was also raised, this Court would assume that the decision was based upon the non-federal question and would not take jurisdiction;—still in the case at bar, as against the Pioneer Iron Company, which was *not a party to the suit*, there can be no question or issue, even though non-federal, which could support a judgment affecting its rights or property; *and the entry of judgment in such a case, inexorably involves a federal question to the exclusion of all others.* It follows that if by judgment of the state Courts, based upon any theory whatever, the property of the Pioneer Iron Company was taken or diminished in value, the same was so taken without process of law as against that company; and an invasion of its constitutional rights and those of its stockholders was thereby necessarily involved. *The existence of a federal question in this case, therefore, depends upon the practical results of the judgment complained of, viz; were the property or rights of the company thereby "taken" or affected?*

The effect of the judgment which was affirmed in the Supreme Court of Michigan is to determine the rights of the Pioneer Iron Company under the lease in question, and to find that by acts and defaults of said company, said lease was terminated and lost to it. The further result of the judgment was an injunction, — the enforcement of which will prevent the officers of the Pioneer Iron Company, as its representatives, perpetually from asserting its rights under said lease.

The rights of the Pioneer Iron Company and its property interests have, therefore, been practically decided and determined and a denial of the constitutional right of that company and of its stockholders is necessarily involved. *The question now for consideration, therefore, is; What was the substance of the thing done? What was the effect of the judgment rendered? rather than, What was the theory on which said judgment was based?*

An examination of said claimed non-federal questions *as now set out by defendants in error* will further illustrate the unsoundness of the proposition taken in this Court.

It is claimed, that, among the questions decided by the state Courts, were the following:—

1. That the Pioneer Iron Company died April 2, 1887, with the expiration of its first charter.

2. That the reorganization and extension was not in compliance with the law of Michigan, and was irregular and void.

3. That if the reorganization was effective to create or continue a corporate body, such corporation was not the Pioneer Iron Company which had been contracted with as lessee in the 99 year lease, nor its corporate successor within the meaning of the lease.

4. That the constitution and laws of Michigan, providing for the extension of the corporate existence for a second period of 30 years, with right and power in such renewed corporation to continue to own and hold corporate property, are in violation of the 14th Amendment of the federal constitution and hence void as against the defendants in error."

It is further claimed that the Supreme Court of Michigan decided that the Pioneer Iron Company was a "dummy," and notwithstanding its renewal and corporate reorganization

recognized by the state, it was not a real corporation having property and legal rights to be protected.

It is sufficient answer to all the above contentions that the Supreme Court of Michigan expressly declined to pass upon said contentions. In its opinion, (Record, page 576), said Court says:—

> "Various important questions are raised by counsel as to the effect of this reorganization statute, the validity of the act of reorganization by the Pioneer Iron Company, as to whether the Pioneer Iron Company was in position to avail itself of this statute; and also the effect upon the 99 year lease, should the reorganization be held valid. *Inasmuch, however, as these questions are not essential to a decision of the case, we refrain from determining them.*"

Thus intentionally leaving undisturbed and unaffected the validity of the reorganization and the corporate character of the Pioneer Iron Company, with all corporate rights given and recognized by the State of Michigan.

Under the undisputed conditions, even had the Courts of Michigan decided on the grounds so claimed that the 99 year lease was terminated, — the Pioneer Iron Company, not being a party to the suit, — such decision would have been clearly without due process of law, and an invasion of the constitutional rights of that company. If the regularity or legal effect of the organization of the Pioneer Iron Company was being drawn in question as a means of destroying its property, that company should have been permitted its day in court and a hearing in defense of its rights.

The Supreme Court of Michigan, it is true, said in its opinion, (Record, page 569):—

> "Under the allegations of the bill and as well under the proof, the Pioneer Iron Company *is used* as a "dummy" for the benefit of the defendant companies."

If in making this statement, more had been intended by the Court than merely to set forth the effect of the allegations made by and the proofs offered in behalf of the complainants, — if it *had decided a fact* as a reason for terminating the 99 year lease and as a basis for the perpetual injunction granted,—then such decision was one of the steps and determinations which we complain of as being in violation of the constitutional right of the Pioneer Iron Company. *The question of fact as to whether or not this company was used in any manner which would destroy its rights was one upon which it had the right to be heard.*

It is also claimed and emphasized in this connection that the books of the Pioneer Iron Company were not brought into Court and thrown open to inspection of competitors and adversaries. Had the Pioneer Iron Company been a party to the suit and had its books and accounts and its doings become germane to the action, such argument might have force, but when we consider that the Pioneer Iron Company was not made a party to the suit and that no step which could be taken by the defendants who were in Court, would serve to protect its property or its rights, the refusal to go into the private affairs of the company and to produce and throw open its books is amply explained. No proper or legitimate use of such books could have been made relative to any of the issues between the parties before the Court, because the Pioneer Iron Company was not in the case and the books were the books of that company. The only apparent uses which might have been expected were to give other competing corporations a knowledge of its private business.

Upon any view of the proceedings and judgment of the Courts of Michigan, the effect and the result is *the taking and the destruction of the rights and property of the Pioneer Iron Company in a suit to which it was not a party*, and the destruction and diminution in value of the stock and holdings of the plaintiffs in error, stockholders of that company, without

due process of law, and without being represented or having an opportunity to appear and defend the rights so taken. The judgment, therefore, of the Courts of the State of Michigan, should be by this Court reversed and the case should be ordered remanded and dismissed.

The questions actually decided by the Michigan Courts show necessity for presence of The Pioneer Iron Company, and that its constitutional rights were violated.

We have said that the entire relief asked for by the bill against the defendants in the state courts was based upon the claim that the 99 year lease had ceased to exist as the property of the Pioneer Iron Company, and that the same should be declared terminated and at an end.

We have also shown that the courts of Michigan were of necessity required to and had adjudged said lease to have terminated upon the grounds and for the reasons set out in the bill. *We cannot here more strongly illustrate or set forth the necessity for the presence of the Pioneer Iron Company as a party to the suit and the injustice and destruction which has resulted to it and to its stockholders from the adjudication of its rights in its absence, than by stating more in detail the claims set up in the bill as grounds for terminating this lease, together with the findings and determinations relative to the same.* In this manner it will be concretely seen not only that defendants who were in Court were nominal and formal merely, and legally powerless to defend, but also that the holdings upon these several claims relative to this lease, were apparently so unjust and at variance with all precedent that had the Pioneer Iron Company been present with power to introduce its complete defence, the result should and probably would have been a different one, protecting rather than destroying vested property rights.

The record shows that after setting out the execution to the Pioneer Iron Company of the 99 year lease and the facts showing that they had succeeded by mesne conveyances to the

titles of Harvey and of Reynolds respectively in the lands in question, the complainants in their bill proceeded to allege facts which it was claimed *had terminated said entire 99 year leasehold as the property and right of the Pioneer Iron Company,* by reason of which it was averred that said lease was void, but remained as a cloud merely upon complainants' title, which should be removed by declaring the lease void, and by quieting said title.

Five claims and grounds were asserted as reasons why said 99 year lease had become and should be decided void. (Record, pages 10 and 11). They were:

1. That the right given in said lease to enter upon said lands and to mine for and take ore therefrom, was confined and limited to the taking such ore only as was required for use in its own furnace then being built at Negaunee; that such furnace so built had been abandoned and dismantled and the rights of the Pioneer Iron Company under said lease were, therefore, terminated.

2. That the right which Harvey received from James L. Reynolds to mine ore for manufacturing purposes, without accounting to Reynolds therefor, was an indivisible right, which was not susceptible of assignment except as a whole; and that the 99 year lease given by Harvey was an attempted assignment of a part only of said entire right, — by reason of which it did not and could not vest in the Pioneer Iron Company any right or interest in the minerals reserved to said James L. Reynolds.

3. That by abandonment, the rights granted to the Pioneer Iron Company had become terminated and had reverted to Harvey, the grantor.

4. That the corporate existence of the Pioneer Iron Company had expired by constitutional limi-

tation in April, 1887, and that whatever rights and privileges had been acquired by the Pioneer Iron Company under the 99 year lease thereby became terminated.

5. By amendment, (Record, pages 49, 50), it was claimed that if the Pioneer Iron Company had been reorganized under the amendment to the constitution of Michigan and the statutes passed pursuant thereto, and if, as so reorganized, said company appeared to retain rights under said 99 year lease, yet the statutes under which it was so reorganized were in violation of the constitution of the United States, and so void, — by reason of which said company retained no property rights in said lease.

For each and all of said reasons, and upon said grounds respectively, the complainants claimed that the Pioneer Iron Company had lost said 99 year lease; and the termination of the same should be decreed by the Court.

It was also averred that *said lease having terminated,* the defendants were, therefore, wrongfully acting in asserting the rights of the Pioneer Iron Company thereunder. It being necessary, therefore, before any decree or judgment could be rendered in the case, to pass upon and decide the rights of the Pioneer Iron Company under the 99 year lease, *and to find as a basis for injunction that said lease had terminated and was void,* — it is evident on the face of things that the right to any remedy against defendants *was dependent upon the finding that there was a right to a remedy against the Pioneer Iron Company,* and that on some one or more of the grounds hereinbefore stated, said 99 year lease should be found void.

IT IS OUR CLAIM THAT NO JUDGMENT SHOULD HAVE BEEN RENDERED IN THE CASE AGAINST THE DEFENDANTS WITHOUT FIRST PERMITTING THE PIONEER IRON COMPANY TO

BE HEARD UPON THE QUESTION OF THE TERMINATION OF ITS RIGHTS.

Even a casual consideration of the reasons advanced for declaring this leasehold terminated will make plain and demonstrate the justice of the position which we take.

Not one of the reasons advanced in the bill as grounds for terminating the 99 year lease is found on the face of the instrument itself. They depend in each instance upon alleged facts, outside of the lease, raised by parol and being in the nature of additional terms and conditions, or of subsequent claimed acts or defaults. Each of the claims so made was issuable, and as to each the Pioneer Iron Company had the right to be heard before its property could be found and adjudged to have been lost.

Reasons Alleged by Defendants in Error for Terminating the 99 Year Lease.

First.

THAT THE LEASE WAS APPURTENANT TO THE FURNACE AT NEGAUNEE; THAT SAID FURNACE HAD BEEN DISMANTLED AND DESTROYED PRIOR TO THE SUIT, AND THAT, THEREFORE, THE LEASE WAS TERMINATED AND AT AN END.

No such condition or provision is found in the 99 year lease itself. (Record, pages 18, 19). The plain and express language of the instrument is directly opposed to such a claim. It gives in terms the *general right to mine and remove iron ore from said land,* "subject to the provisions hereinafter mentioned."

To determine whether or not the 99 year lease was intended as a bare appurtenance to a furnace,—and to properly interpret said lease in that respect, the Court must place itself in the position of Harvey and his associates in the year 1857,

just prior to and at the time of the organization of the Pioneer Iron Company. Harvey was then inducing his associates to invest their money and go into the Pioneer Iron Company with him. He was to be the largest stockholder and the manager of the company. It was his enterprise. He took upon himself the negotiation for and purchase of lands from Reynolds for the use and benefit of the company then being organized. In the conveyance from Reynolds "the sole right," — "to mine for their own use or for *manufacturing purposes within the present limits of Marquette County,*" was undoubtedly obtained for the benefit of the Pioneer Iron Company which was then being organized "for manufacturing purposes."

Harvey himself, (Record, page 419), testified:—

"I negotiated these deeds and contracts in the State of Michigan. I was their (his associates) agent and trustee in that state. That is, I was *their agent trusted by them.* I was never an official trustee, of course. They trusted me to do these things for the company. I promoted the company; that is, originated the company; got these other gentlemen to take stock and join me in the enterprise. Perhaps the use of the word "promoter" might not be proper, because I was taking an interest myself. Generally promoters are selling out. *I retained the largest interest in the start*, but I was what you would call the originator, the person who first suggested the plan. These other gentlemen who went in with me and constituted the company paid their money into it and also paid their assessment subsequently as I did."

He also testified, (Record, page 448):

"I believe at that time there was a great future for the Lake Superior country, and especially Marquette County, in the development of a charcoal pig iron industry. It was generally anticipated both by myself and Mr. Reynolds and others that if we could start one or more furnaces there it would give a considerable impetus to that infant industry."

So that the deed from Reynolds with contract "A," attached and the subsequent transactions were for the Pioneer Iron Company. It was explicitly understood that iron ore might be mined free of charge or accounting, — *to be manufactured within Marquette County.* This was the careful wording of the instrument between Harvey and Reynolds, but made for the benefit of this "infant industry," being organized. Their purpose was to get more factories into that county, not to restrict them; to create a greater demand for charcoal iron, not to narrow the rights obtained.

Examine now the conveyances which Harvey made to the Pioneer Iron Company of the rights and property which he had obtained for himself and his associates in that enterprise. On April 22, 1857, the deed for 3488 acres, was made to the Pioneer Iron Company, subject to the reservations, etc., in the deed from Reynolds to Harvey. At the same time a "*preliminary agreement*" was executed from Harvey to the Pioneer Iron Company, (Record page 408-9). By the terms of this agreement Reynolds conveyed in perpetuity to the Pioneer Iron Company the right, free of charge, to mine such iron ore "as it should convert into merchantable iron *in its own establishment.*"

Harvey testified relative to this agreement, (Record, page 492):—

> "That it was not regarded as anything final, as I said before. Simply a safeguard against anything happening to me until the thing could be consummated, simply as a memorandum entirely superseded by the one dated later and given in the nature of a protection against anything that might happen to me in the meantime before the other was consummated."
>
> "The instrument as finally executed and acknowledged and recorded was the agreement."

It appears from the record that matters went along without more definite stipulation until about September 17th,

1857. In the meantime *Harvey had gone to New York and met his associates,* the names of whom he tells, (Record, page 491). In his testimony, (Record, page 493), he says upon this subject:

> "*When I got home from New York to Michigan I then executed the* 99 *year lease,* which is the instrument of record, and caused it to be recorded."

Further, (Record, page 494):—

> "Q. What was said between you?"
>
> "A. *They appointed a committee to examine into the matter and they reported that it was in proper shape,* — a committee of the board. All the talk and passing of minutes back and forth, done nearly fifty years ago, has, of course, pretty nearly faded out of my memory."

At this meeting in New York, Harvey met his associates and with their committee finally agreed upon the terms of the 99 year lease. It will be observed that the *preliminary agreement was changed* in two particulars, one of which is most significant as to the nature of the rights finally granted, and as showing the evident and express purpose *of enlarging the uses provided for by the "preliminary contract."* It was provided *by the "preliminary contract"* (1.) that the rights should be in perpetuity; and (2.) *that the Pioneer Iron Company should have the right to mine ore for use, in its own establishment."*

By the 99 *year lease* it *is* provided:

(1.) That instead of the right in perpetuity. — the same should last for 99 years; and

(2.) That instead of the right to take ore "to be converted into merchantable iron "*in its own establishment,*" it should have the right to mine or remove such ore as it "shall actually convert into merchantable iron "*in its own furnaces or forges.*"

The latter of which changes was obviously made to avoid the very claim now being advanced, namely; that in-

stead of "iron ore for use in a *particular establishment*," the instrument should be made to grant rights generally to mine ore for use in the furnaces and forges of the company.

This modification was no accident, but was purposely made. The parties thus intentionally changed and enlarged the rights proposed to be given them, so that the 99 year lease would convey a mining right, "*subject to the terms hereinafter stated*," without limit, except as to the natural expansion of the Company.

In the light of all these admitted facts, and construing the words of the instrument most strongly against the grantor (Trustee of the company), how should this 99 year lease be construed relative to the claims made by defendants in error?

Was it intended as a appurtenance to the furnace at Negaunee? or was it a grant of a right to take ore to be converted into iron *in the company's own furnaces or forges, within the present limits of Marquette County?*

We have said that no such condition or provision as that now insisted upon, *making the lease an appurtenance*, is found in the 99 year lease itself. It gives the general right to mine and remove iron ore from said land, "*subject to the provisions hereinafter mentioned.*"

Among the provisions thus referred to, there are two (and only two) which limit the right to mine and take ore, and designate where and how the same shall be used. They are:

1. "Provided it shall not quarry, mine or remove any ore on said land except such as it shall actually convert into merchantable iron *in its own* furnaces or forges."

2. "All the above rights and easements are subject, however, to the *terms of a certain deed and agreement accompanying the same, executed by James L. Reynolds* and wife to the party of the first part on the 26th day of February, 1857, etc."

thus making the said Reynolds *deed and agreement* (which had really been obtained for the Pioneer Iron Company) a part of said lease.

The agreement with Reynolds so referred to is this (Record, page 15):

> "Provided,—and it is agreed, however, that the party of the second part or his assigns shall have the sole right, free of cost or compensation to the first party, to mine, for their own use, *or for manufacturing purposes, within the present limits of Marquette County*, any mineral ores or marble found on any of the premises herein referred to; but shall have no right to sell to other parties for exportation, as aforesaid, without accounting to the party of the first part for his joint half interest therein."

It is thus seen that by the express terms of the 99 year lease, the right is given the Pioneer Iron Company to mine for and take iron ore which it shall *actually convert into merchantable iron*, (1) in *its own* furnaces and forges; and (2) that such furnaces and forges shall *be within the then limits of Marquette County*.

It will be noted that Harvey made this lease to the Pioneer Iron Company covering land *which he had really bought for it*. The fact is also to be considered that by the lease he reserved no right in himself to mine or take iron ore from this property; and that by no word in the instrument does the grant limit the amount of ore to be taken, except that it shall be "such ore as shall be converted into merchantable iron in *its own* furnaces and forges."

By no word in the lease is the company limited in the growth of its business or as to the number, location or condition and improvement of its furnaces and forges, — except that the same must be *within the present limits of Marquette County*." It is evident that the interests of the company,

of which Harvey was then the confidential agent, were opposed to such provisions.

Although Harvey was the manager of the company, acting for it, and with full knowledge of all its purposes and of the agreements which were intended to be made, and therefore could and should have inserted all the limitations and provisions which were covered by the agreement being entered into, — *it is a noticeable fact that no such limitation was made as that now asserted by complainants.* The instrument does not deal with or cover the manufacturing branch of the company's business. It is confined to a grant of mining rights and the easements in the surrounding premises, including rights of way and other surface privileges. *Such is the lease as actually made.*

To substantiate the claims made in their bill, it was necessary that complainants, *by parol contemporaneous evidence,* change the entire nature of this instrument. Instead of a *grant of mining rights,* which should, as therein stated, "descend to the corporate successors of the Pioneer Iron Company," it became necessary, by parol additions, to change the same to *a bare appurtenance to a furnace at Negaunee,* — "*a mere incident necessarily connected with the use of that furnace.*"

Jones on Real Property, Sec. 1636;
Humphreys v. McKissock, 140 U. S., 304, 313.

Aside from the history of the transaction and the plain words of the instrument, there is another consideration which strongly and conclusively confirms the conclusion that the 99 year lease was intended as a grant of mining rights to take iron ore for use in "*their own furnaces and forges within the present limits of Marquette County.*"

By the terms of the instrument it was provided that "the rights and easements above mentioned shall descend to the corporate successors of the party of the second part, *but not to its assigns.*" (Observe the grant was not made to

the owners of the furnace at Negaunee, or to the corporate successors with, or in connection with, or provided they continued to operate, this furnace.)

The rights and easements granted were not assignable. If, therefore, said mining rights were appurtenant merely and incidental to the Negaunee furnace, that furnace could not be sold or transferred without thereby avoiding and forfeiting the 99 year lease.

If the lease itself was appurtenant to the furnace, *and was not assignable,* it follows that the furnace to which it was so attached could not be conveyed or transferred without at once destroying the appurtenant lease. Such a condition would be plainly against public policy.

Anderson v. Carey, 36 Ohio State, 506;
Mendelbaum v. McDowel, 29 Mich., 78;
McClery v. Ellis, 54 Iowa, 311;
Jones on Real Property, Sec. 660.

A construction leading to such results should, therefore, be avoided.

No ambiguities or uncertain language requiring or permitting parol explanation are to be found in the lease. The rules of law, requiring strict construction most strongly against grantors, and especially against a grantor standing in a trust relation to the grantee, and being himself the person who accepted the grant for the grantee,—were all opposed to this claim that the lease should be found and determined a mere appurtenance to a furnace.

This contention was heard and decided, and on parol evidence the court practically at one and the same time *made for the parties a new lease, — and declared the same terminated, because of acts and defaults specified and found to be in the new, but in fact not covered by the terms of the old leasehold.*

In such a proceeding the Pioneer Iron Company should have been heard. It was the only party legally interested in the lease or in its preservation; and had that company been before the court a decision so at variance with the evident purpose of the lease itself, and with the legal duties of the parties to the same, could hardly have been rendered. The relation of Harvey to his trust would have been taken into account, and no unjust or unconscionable advantage would have been permitted, either as the starting point of the rights of either of the original parties, or as the basis for the termination of those rights *at the instance of persons who bought with full knowledge of the existence of the lease.*

Second.

The second of the grounds asserted by defendants in error for the termination of this leasehold right is; THAT BY CONTRACT "A" ATTACHED TO THE DEED FROM REYNOLDS TO HARVEY (Record, page 15), THE PROVISION WHEREBY HARVEY AND HIS ASSIGNS WERE PERMITTED TO MINE FOR MANUFACTURING PURPOSES WITHOUT ACCOUNTING TO REYNOLDS, CONSTITUTED A CLAIMED INCORPOREAL HEREDITAMENT WHICH WAS INDIVISIBLE, AND NOT SUSCEPTIBLE OF ASSIGNMENT EXCEPT AS A WHOLE; THAT BY THE EXECUTION OF THE 99 YEAR LEASE TO THE PIONEER IRON COMPANY HARVEY ATTEMPTED TO DIVIDE SAID INCORPOREAL HEREDITAMENT AND THUS DESTROYED THE SAME, — by reason of which the Pioneer Iron Company acquired no right as against Reynolds to mine for ore without accounting.

This claim so advanced by complainants (who were at most remote grantees of Reynolds), raised a controversy in which the Pioneer Iron Company had a right to be heard, and

to which it was an indispensable party. The substance of the claims made by complainants was, when taken in the light of the facts shown by the record, — that, although Reynolds had conveyed to Harvey for the very purpose of enabling him to interest capital in the organization of the Pioneer Iron Company, and to use this land as an inducement to the establishment of iron manufacturing industries;—and although he knew of this grant to the Pioneer Iron Company, and, in fact, accepted $25,000 of his purchase money directly from that company (without objection or protest so far as the record shows—and without subsequent proceedings of any character to terminate the rights on which this company would rely as a basis for their investment) — *yet by the very act of the making and delivery of the 99 year lease, the provision of contract "A" by Reynolds to Harvey and his assigns, became null and void. And, although no objection or adverse claims were made by Reynolds himself, yet after fifty years the complainants, who claim as his grantees, may now assert the right to forfeit and terminate this mining grant referred to in contract "A"* of the deed from Reynolds to Harvey.

Even if we assume for the sake of argument (what we do not admit, but deny), that the proviso in contract "A" (Record, page 15), created an incorporeal hereditament in Harvey, and that by reason of the facts alleged in the bill, Reynolds himself might, *for such claimed division*, have terminated and forfeited this mining grant, *had he acted at once;* yet after all this lapse of years, during which the capital stock of the company was permitted to be transferred and sold in apparent safety, and during which the generation of that time passed away, even *Reynolds himself, if before the court, would now be estopped from asserting such an inequitable and unjust claim.*

Harlow v. Iron Co., 41 Mich., 533 (see opinion);
Campau v. Iron Co., 50 Mich., 578, see 595;
Jones on Real Property, Sec. 1814, n. 1;

Pomeroy, Eq. Jur., Secs. 817, 1359, 687, 897, 916, 965.

But assuming only for the sake of argument, that either Reynolds or Harvey might have caused a forfeiture of the rights of the Pioneer Iron Company under the 99 year lease for breach of the implied condition that an incorporeal hereditament may not be divided, or for other claimed breach of condition, yet such *rights of forfeiture did not pass to the grantees of those original parties.*

Jones on Real Property, Secs. 696, 708, 728, 729.

Those rights to forfeiture were not part of the estate. They were at most causes of action (personal to the owners of the land), and did not pass from the original grantors by their subsequent deeds of conveyance.

Ruch v. Rock Island, 97 U. S., 693;
Jones on Real Property, Secs. 696, 697, 728, 729;
Hayward v. Kinney, 84 Mich., 596.

A breach of such conditions or implied conditions does not *ipso facto* work a forfeiture of the freehold estate to which they are annexed, but only vests in the grantor or his heirs *a right of action which cannot be transferred to a stranger.*

Jones on Real Property, Sec. 708;
Schulenberg v. Harriman, 21 Wall., (U. S.), 44, see 63;
Ruch v. Rock Island, 97 U. S., 693;
Gross v. Carson, 47 Amer. Dec., 754, n.;
Hubbard v. Hubbard, 93 Amer. Dec., 75.

In *Ruch v. Rock Island*, 97 U. S., 693 (see opinion, 696), Mr. Justice Swain uses the following language:

> "The estate continued in full force until the proper step was taken to consummate the forfeiture. This could only be done by the grantor in his lifetime, and after his death by those in privity of blood with

him. In the meantime only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger."

"Owing to the common law rule, that the possibility of reverter belonging to a grantor of an estate upon condition subsequent, is not such an interest before entry for a breach as can be legally conveyed to a stranger; a conveyance of such an interest operates as a discharge of the condition, for while it deprives the grantor of his right to avail himself of a breach, it does not transfer such right to the person to whom he attempts to grant it."

Conditions can only be reserved for the grantor or his heirs. A stranger cannot take advantage of a breach of them.

4 *Kent Comm.*, Sec. 56.

Where a covenant is broken and the property is afterwards sold, the right of action (for breach of covenant) does not pass with the deed. The deed does not operate as an assignment of the cause of action.

Peden v. Ry. Co., 73 Ia., 328.

It therefore appears by an unbroken chain of authority that even though contract "A" created an incorporeal hereditament, one of the implied conditions of which was that the same should not be divided, for which, if so divided Reynolds himself while the owner of the estate might have caused a forfeiture of the right, — his grantees, the present complainants, did not receive from him a conveyance of his right to insist upon such forfeiture.

Even though it were claimed that the 99 year lease itself created only an incorporeal right, and that the same had been divided, — by reason of which division *Harvey might himself have forfeited such leasehold*,—yet his grantees, the present complainants, received by their conveyance no assignment of his right of action.

FORFEITURE WAIVED.

BOTH REYNOLDS AND HARVEY AND THEIR GRANTEE WAIVED ANY RIGHT TO FORFEITURE BECAUSE OF DIVISION OF A CLAIMED INCORPOREAL HEREDITAMENT.

On February 1, 1871 (Record, page 182), *Reynolds* executed a lease to Edward Breitung (the grantor of defendants in error). By said lease he expressly recognized the rights of the Pioneer Iron Company *under the 99 year lease,* and Breitung agreed to permit that company to exercise its rights under said lease. *Reynolds thus clearly recognized the continued existence of the 99 year lease,* and Breitung not only took subject to said lease, but agreed that he would himself recognize the rights therein conveyed.

On February 1, 1871 (Record, page 178), *Harvey* executed a lease to Edward Breitung, in which instrument the same 99 year lease is also expressly protected, and Breitung agreed that he would permit the exercise of the rights of the Pioneer Iron Company thereunder.

The Record also shows, pages 196, 197, and also page 177, that Breitung himself made mining leases to various parties, — all of which were expressly subject to the reservations in said leases hereinbefore referred to, executed to Breitung by Reynolds and Harvey respectively.

Under such express recognition and reservation of the 99 year lease and all rights granted thereunder, not only by Reynolds and by Harvey in person, but also by Edward Breitung (through whom defendants in error mainly claim), how can these grantees, defendants in error, now assert the right of forfeiture because of the execution of the 99 year lease, or because of any claimed division of an alleged incorporeal hereditament?

If Reynolds had a right to forfeit contract "A" because of the execution of the 99 year lease, he did not assert that right, but expressly waived it.

Even if Harvey had a right of forfeiture because of any claimed violation of either express or implied conditions of said 99 year lease, he did not assert that right, but expressly waived it.

Edward Breitung, the grantee, in so many words agreed to recognize the 99 year lease and the privileges conveyed thereby.

The present defendants in error acquired all rights asserted by them in this case with full notice and knowledge of the property rights and privileges of the Pioneer Iron Company which they now seek to destroy.

In any possible view *of this technical claim to a right of forfeiture,* no court of equity could have countenanced the position taken by defendants in error *had the Pioneer Iron Company been a party to the suit.*

"Contract A" created a RESERVATION for Life of Reynolds Only.

The foregoing discussion and considerations have been upon the assumption that "*Contract A*" attached to the Reynolds deed created a valid exception from the grant by Reynolds to Harvey and that the same passed and descended to the heirs and grantees of Reynolds, as claimed by defendants in error.

We do not in fact concede these claims. We deny that "Contract A" was intended to or could constitute "*an exception*" from this grant. *It was plainly "a reservation,"*—a right of an incorporeal nature granted by Harvey *to* Reynolds and attached to this property as a part of the consideration *given by Harvey for the deed of the land.* This reservation did not run to the heirs and assigns of Reynolds; hence it was for his life only.

If "*Contract A*" was intended and could be construed to be an *exception,*—it was repugnant to the grant.

The land conveyed was mainly valuable for its minerals and it was largely the minerals which induced the purchase by Harvey. The deed to Harvey conveyed in terms "all the right, title and interest" of Reynolds in the *entire estate.* In the warranty clause it is provided; "that said lands are sold *with full warranty,* subject, however, to the conditions and agreements of "Contract A" herewith appended, etc., etc."

If "Contract A" thus referred to had been intended as an exception from the deed, and a withdrawal from the grant, (already expressly made), of a full one half of the mineral estate thereinbefore conveyed, such an exception is repugnant to the grant and must be held void.

Erickson vs. Michigan Land & Iron Co., 50 Mich., 608;
Cutler v. Tufts, 3 Pickering, 272;
1st Jones Real Property, Secs. 515, 516.

A party to a deed should not be presumed to intend to grant and convey his entire estate, and later, in the same instrument, withdraw from the grant and retain in himself one-half of the interest already conveyed. Reynolds did not by this conveyance intend such an incongruity. *No exception from the grant was intended at the time.* As hereinbefore stated, the deed which Reynolds and his wife executed to Harvey was in fee simple absolute, covering repeatedly and by most sweeping and explicit language all the estate, right, title and interest which Reynolds had therein. It was *in the warranty clause* that "Contract A" was mentioned. The language there used is significant;—"which said lands are sold *with full warranty, subject, however, to the conditions and agreements of "Contract A,"* herewith appended, between the parties hereto concerning *the undiscovered minerals* on said lands."

"Contract A" is thus referred to and *treated as an encumbrance,*—then and thereby created and fastened upon these lands by this agreement.

It will be noted that the consideration for the conveyance of the deed is peculiar. The deed itself says,"*in consideration of the sum of* $30,000." "Contract A" says;—"that the first party has this day conveyed by "warrantee" deed to the party of the second part certain lands, etc., etc., *for the consideration of the sum therein named, and also for the further consideration of reserving to himself an undivided half in and to the minerals which have been or may be discovered* on the premises referred to as conveyed,—together with the right, etc., etc." Harvey, then, agreed to pay to Reynolds as consideration for the lands in question the sum of $30,000, *and the conditions and agreements of "Contract A,"*—which were made an encumbrance upon the property.

This instrument is called by the parties "*a reservation,*" and while this term is not conclusive of the nature of the rights "reserved," it is to be considered together with all other facts. *What was the nature of the "conditions and agreements" of "Contract A?"* Were the rights therein specified such as to constitute "*an exception,*"—a keeping of a part of the estate; or a "*reservation,*"—a creating of new, incorporeal rights, *granted by Harvey to Reynolds?*

The deed itself refers to the "conditions and agreements," —"*concerning the undiscovered minerals on said lands.*" Contract A speaks of such agreements as "*reserving*" to himself *an undivided one-half in and to all the minerals which have been or may be discovered on the premises referred to as conveyed*, together with the right of *having or acquiring* so much of the surface privileges as may be necessary to mine, etc., by paying, etc." The record shows that no minerals had at that time been discovered in any valuable quantities. Where were the minerals located that were so "reserved?" To how much of the premises conveyed did this right attach? Where was that part located? What surface privileges were necessary or required by Reynolds? All these questions were, and of necessity must have been, unknown to the parties themselves. It is therefore plain that the rights

"*reserved*" to Reynolds, and provided for in "Contract A" consisted only of "*contingent, indefinite, floating and incorporeal rights to prospect for and acquire surface privileges for mining, and for minerals should minerals be discovered.*"

In *Harlow v. Mining Co.*, 36 Mich., 105, such rights were *decided to be incorporeal in their nature.*

Had Harvey purchased this entire property from Reynolds, and thereafter in the exact terms of "Contract A," *granted the same rights to a third person,* he would thereby undoubtedly have created an incorporeal right in that person,—simply a right to discover and take out minerals when found, and a right to acquire the necessary surface privileges upon *some* indefinite portion of the land. In principle this right was analogous to the taking of water from a spring,—or the creating and operation of a mill race,—the discovering and taking of coal, and the like, — all of which have been decided to be incorporeal in their nature. But, by the very terms of this instrument Harvey, for a valuable consideration, deeded and granted to Reynolds just what he would have conveyed to a third person.

In its nature, therefore, the estate granted to Reynolds was "*a reservation,*"—and not an exception of any designated part of the estate.

The very difference between an exception and a reservation is this; that whereas *an exception* keeps *in the grantor* something which has never passed from him with the deed, —*a reservation* operates to create a new estate or right as a grant back from the grantee to the grantor.

Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass., 321.

Such we claim is the interest which was acquired by Reynolds.

Being thus merely a contract right, creating an incorporeal interest of an indefinite nature in Reynolds, since

"Contract A," by its terms, was not made to run to *the heirs of Reynolds,*—it must be construed as a right only for his life and ending with his death.

Jamaica Pond Aqueduct Co. v. Chandler, 9 Allen, 170;
Curtis v. Gardner, 13 Met., (Mass.) 460;
Shields Exr. v. Delo, 145 Pa. St., 393;
Lathrop v. Elsner, 93 Mich., 599.

For the foregoing reasons, if for none other, the heirs and grantees of Reynolds have no rights whatever under *"Contract A;"* and they cannot now be heard to demand the forfeiture of the 99 year lease, because of a division of a claimed incorporeal hereditament.

"Contract A" even though an Exception, created no Incorporeal Hereditament in Harvey.

Harvey and Reynolds became tenants in common of the minerals.

Even if we are wrong in construing "Contract A" as *"a reservation,"* to Reynolds, and if it could be found to constitute *"an exception,"*—keeping in Reynolds and his heirs an undivided half interest in the minerals, yet no incorporeal hereditament was by that contract and its proviso *granted to Harvey.*

Assuming that "Contract A" was an exception from the grant,—Harvey then became the owner in fee of all the surface and of one-half of all the minerals,—and Reynolds retained the ownership in the remaining one-half of such minerals.

Harvey and Reynolds then, as to the minerals, became tenants and owners *in common.*

Harvey and his grantees then, *as matter of law,* had the undoubted right to mine at will, so long as they did not exclude Reynolds from doing the same.

Barringer & Adams, Mines & Mining, 18, 744;
McCord v. Oakland, 64 Cal., 134;
Jones on Real Property, Sec. 1914;
Kean v. Connelly, 25 Minn., 222, 225.

Without contract, Harvey as tenant in common or joint tenant had the right to mine for and dispose of iron ore from this property and the only duty which he as such tenant in common would have owed to Reynolds was simply that of *accounting for the undivided one-half of the iron ore so mined less the expense incurred.*

Jones on Real Property, Secs., 1914, 1918;
McCord v. Oakland, 64 Cal., 134;
Washburn on Real Property, 436;
Barringer & Adams, Mines & Mining, 19, 25; 26, 744, 746, 747;
Revised Statutes of Michigan, Sec. 5778;
Fuller v. Sweet, 30 Mich., 242;
Coleman's Appeal, 62 Pa. St., 252.

Owning the fee with the entire surface right, Harvey might also have conveyed the same even in parcels with his full and entire undivided interest in the minerals thereunder, without further contract.

4 *Kent Comm.,* 368.

These being the legal rights of Harvey and his grantees, what is the effect of *the proviso found in "Contract A,"* attached to the Reynolds deed? It was intended to be and was, in so many words, *a waiver of the duty which Harvey would otherwise have owed to Reynolds, to account* for the ore which he or his assigns might mine and take out for *"manufacturing purposes within the present limits of Marquette County."* But it expressly provides that *this waiver does not extend to ore sold by Harvey to other parties for exportation.* As to such ore it says; "but shall have no right to sell to other parties

for exportation as aforesaid *without accounting to the party of the first part for his joint interest therein.*"

How, then, upon any construction, could *this proviso* create an incorporeal hereditament in Harvey,—a new right in him, simply engrafted on and connected with his landed estate, but not otherwise a part of his fee simple, and not in any manner merged therein? As said in *Barringer & Adams, Mines & Mining, page* 25, citing *Coleman's Appeal,* 62 Pa. St., 252, — "it is not conceivable as matter of law that a man can have an incorporeal right to dig ore in his own fee."

Such a theory would be at variance with every principle of law relating to real property. All the permanent and attendant rights and property interests which result in connection with this proviso necessarily merged in Harvey's fee simple estate.

Morgan v. Menth, 60 Mich., 238;
10 *Am. & Eng. Ency. of Law,* 433;
Warren v. Blake, 89 Amer. Dec., 748;
Washburn on Real Property, pp. 80, 89.

Had the Pioneer Iron Company been a party to this suit, with power to assert and defend its rights, the plainest considerations of justice and right would have prevented the forfeiture decree because of a claimed division of an alleged incorporeal right *in Harvey,* for the following reasons:—

(1.) Reynolds and his grantees were estopped to assert the same and had waived such forfeiture even if Reynolds retained rights under which he might have asserted it.

(2.) *Reynolds had no exception,* but received by Contract A only "a reservation," which ended with his death.

(3.) "Contract A" created no incorporeal hereditament *in Harvey* which could be lost by division.

Third.

The third claim set up in said bill as a ground for terminating the 99 year lease is; THAT SAID LEASE HAD BEEN ABANDONED BY THE PIONEER IRON COMPANY, AND THAT THE RIGHTS OF THAT COMPANY THEREUNDER, HAD "REVERTED TO HARVEY AND HIS GRANTEES AS AFORESAID."

The abandonment was claimed because of alleged delays and alleged positive acts, which defendants in error insisted had worked the loss and termination of the lease.

This question, like the others hereinbefore referred to, was heard, considered and passed upon by the Michigan Courts, and the Pioneer Iron Company now finds itself divested and dispossessed of its property, although unheard and unrepresented, in the suit.

The record shows that this claimed abandonment was based upon evidence that no active mining had been carried on by the Pioneer Iron Company upon the property in question; that the furnace at Negaunee had been abandoned; that the defendants in error had in the meantime either themselves, or through others, carried on mining operations thereon, and that they were mining and removing ore therefrom;—by reason of all of which the 99 year lease became terminated and the property reverted to the complainants below.

Had the Pioneer Iron Company been made a party to the suit, its answer to the above claim would at once suggest itself.

FIRST: There is no provision in the 99 year lease, rendering its use and the actual mining and removing of iron ore therefrom, necessary to its continued existence. No provision was made for its forfeiture for non-use.

The right to mine and take ore under this lease was

founded on a grant, and the same is not lost by the failure to exercise it during the term of such grant.

Day v. Waldon, 46 Mich., 576;
Campau v. Iron Co., 49 Mich., 39;
Arnold v. Stephens, 24 Pickering, 106;
Barnes v. Lloyd, 112 Mass., 231;
Owen v. Field, 102 Mass., 114.

In *Day v. Waldon*, 46 Mich., 576 Judge Cooley says on page 583;

> "The right to the easement was not lost by *mere neglect to assert, use and enjoy it for the period of twenty years.* There is no doubt of this on the authorities. * * * The grant was perpetual without conditions, and therefore, the privileges granted would continue indefinitely whether the grantee did or did not avail himself of it. *An accepted grant cannot be waived or abandoned;* and neglect of the grantee could be no more significant on its bearing on his right, than the neglect to enjoy the freehold to which the easement was appurtenant."

In *Arnold v. Stevens*, 24 Pickering, 106, it was held that the right to dig ore in the land of another was not lost by the neglect to exercise that right *for* 40 *years;*—and that *the fact that the owner used and enjoyed the same property in the manner in which he was entitled to use the same, was no invasion or denial of the right to mine.*

SECOND: Even though the assignees or grantees of Reynolds and Harvey *had* conducted mining operations upon this property, and the Pioneer Iron Company *had not mined* thereon, yet this fact creates no equitable right in complainants *to ask the termination of the* 99 *year lease.* No investment was made in ignorance of said lease; and though complainants had developed mines and were mining upon the property, yet they purchased, with full knowledge and notice of the lease. In

many, if not all, of their deeds those leasehold rights were expressly set forth or referred to.

No claim is made that an interference with mining operations of complainants below has been threatened, or that by sustaining the 99 year lease complainants' rights would be lost. On the contrary, *if their contentions are correct, both they and the Pioneer Iron Company had the right to mine upon this property. They,* under the rights expressly conveyed by Reynolds and Harvey; *the Pioneer Iron Company,* under the rights granted by the 99 year lease. And, since the only use which defendants in error claim to have made of such property, *was such as they claim they were entitled to,* even while the 99 year lease was admitted by them to be in force, — it does not lie in their mouths to say that the fact that they have so mined, should preclude the Pioneer Iron Company from also mining.

Arnold v. Stephens, 24 Pickering, 106; 35 Amer. Dec., 305, 311.

No injury has resulted or could result from the failure or delay on the part of the Pioneer Iron Company to mine and take ore from this property. On the contrary, the property is now more valuable and richer,—it contains more ore because of such delay. *No royalty was to be paid;* hence, by reason of the failure and neglect complained of, a positive benefit has resulted to the grantees of both Reynolds and Harvey. How, then, could they acquire equitable rights, leading to the destruction of this valuable estate, *because of delay* under the circumstances here shown?

From the foregoing authorities and the reasons which plainly make them applicable especially to this case, a leasehold granted for the term of 99 years will not be forfeited and lost *simply by non-use.* Those rights would continue and remain intact, *unless it could be established that they were appurtenant to the Negaunee furnace and that such furnace was intentionally and purposely abandoned,*—thus extinguishing the appurtenant privileges.

THIRD: Even though said lease *be found appurtenant to the Negaunee furnace,* the term of the lease not having expired, the question as to whether the Pioneer Iron Company has permanently abandoned said furnace, or whether it proposes to repair and renew the same, — is one which it should have the opportunity to determine. No Court could so construe the lease as to require continued operation of an antiquated and worn out furnace, nor could it be expected that within the term of 99 years the entire plant must continue unchanged. Since the making of this lease, machinery, methods, and business conditions have been completely revolutionized, and the Pioneer Iron Company must meet the conditions as they exist if it would succeed. The adjudication of these questions, against the rights of the Pioneer Iron Company, therefore, appears in the bare statement of the facts, to have been *ex parte* and without a due regard to the rights of this absent corporation or its stockholders.

Fourth.

The fourth ground assigned in the state Courts, for the termination of this lease was; THAT BY REASON OF THE EXPIRATION OF THE CORPORATE EXISTENCE OF THE PIONEER IRON COMPANY IN APRIL, 1887, THE RIGHTS ACQUIRED BY SAID PIONEER IRON COMPANY BECAME TERMINATED, AND BY OPERATION OF LAW REVERTED TO SAID CHARLES T. HARVEY AND HIS GRANTEES, THE COMPLAINANTS IN THIS CASE,—and this, notwithstanding the reorganization and extension of the company under the law of Michigan continuing its property rghts.

> The first important provision of the lease itself is this: "The party of the first part does hereby let and lease and demise to the party of the second part, for the

consideration hereinbefore named, *for the full end and term of 99 years from and after the date hereof,* the lands, etc.."

At that time, by constitutional provision of the State By the terms of the 99 year lease *it was not assignable;* hence, of Michigan the life of a corporation was limited to 30 years. to preserve the rights of the grantees under said lease for *the period of 99 years,* a further provision was required.

Explicit provision was, therefore, made as follows, (Record, page 20):

> "The rights and easements above mentioned *shall descend to the corporate successors of the party of the second part, but not to its assigns."*

In construing the language of this lease the Court should endeavor to harmonize the entire instrument and to *give effect to all its terms and provisions.*

Vary v. Shea, 36 Mich., 388;
Plano v. Ellis, 68 Mich., 101;
Jones v. Pasby, 62 Mich., 614;
Harlow v. Iron Co., 36 Mich., 105.

That clause which provides that "the rights and easements above mentioned shall descend to the corporate successors, etc., etc.," — should be construed, together with the provisions that *"the party of the first part does hereby let and lease and demise to the party of the second part for the consideration hereinbefore named, and for the full end and term of 99 years from and after the date hereof,* the lands etc., etc.," — so as to give force and effect to *both these terms of the lease,* and if possible to keep the lease alive for the full term prescribed.

The language of the lease as drawn and its terms and provisions, were all used for the purpose of giving it effect *for the full term of 99 years,* and passing it after the end of 30 years to a further corporate organization.

To "descend" is to pass from the holder to another.

(9 *American & English Encyclopedia of Law*, 348). It means to pass from the grantee to some other person and not to terminate. "A corporate successor" *of the party of the second part* would necessarily mean one who should succeed or follow; one who takes the place which another has left, and sustains a like part or character. (*Webster's Dictionary*).

The corporation, either reorganized or extended, to carry on and go forward with this enterprise as the grantee proposed to do, would be the *successor of the Pioneer Iron Company;* and that such a successor was meant, appears from the language "to the corporate successor *of the party of the second part.*" (*I Clark & Marshall on Corporations*, Secs. 335-341, A and B; see also language found in *Railway Co. v. Miller*, 114 U. S., 176-187; *Railway Co. v. Pendleton*, 156 U. S., 669, second syllabus, page 673; *Turnpike Co. v. Sanford*, 164 U. S., 567, see opinion.)

Such was the evident intention of the parties. Such a construction gives meaning to all the terms of the instrument, and protects, in an honest manner, the vested property rights which were in express terms granted to the Pioneer Iron Company.

To construe "*the full end and term of 99 years*" to mean less than that term, and to mean but 30 years, would be contrary to equity and honesty,—and would reverse the maxim "*that deeds are to be taken most strongly against the grantors.*" It cannot be said that with the termination of the corporate organization and powers the ownership of this property ceased and terminated. The *real owners*, for whom this ideal person, (the corporation,) was but the trustee, remained, and *had rights*, when the corporate authority ceased. It could make no manner of difference to the fee owners whether the lessees proceeded to exercise their rights under *the original*, or a *reorganized* corporation.

In the case of *Alexander v. Tolleston Club of Chicago*, 110 Illinois, 65, an attempt was made to terminate vested

rights in a case very similar to this. In that case the owners of land leased to a club all their grounds in a certain section, to be used as a canal and right of way, "*for and during the existence of said club.*" The lease contained this clause; "*Whenever said club shall cease to exist as now organized, this lease * * * shall be determined and cease.*" The club as organized was a mere voluntary association. Subsequently it became an incorporated company—the voluntary association going out of existence and reorganizing as a corporation under the name of the "Tolleston Club of Chicago." It was contended by the lessor that the lease was at an end because *it was granted only to the voluntary association which had ceased to exist.* The Court held:

> "That the grant of the right of way, or canal and its appurtenances, did not cease upon the club becoming incorporated under the statute, assuming all debts of the same and taking all its property; and that the words "as now organized," referred to the purpose of organization, — not to the mode of organization."

In the opinion the Court said:

> "It makes no manner of difference with any rights involved in this lease whether the club be a voluntary association or a corporation. It in no way affects the right of way or the burden on the land, and it cannot be supposed that the mere manner of being organized as a voluntary association, or as an incorporated body, was at all in the contemplation of the parties to he lease." Also
>
> "The inequitable character of the claim which is here set up to defeat this lease, because of alleged incapacity of appellee to take it, is, under the facts of the case, apparent, etc."

Just as in the case at bar, it is not the *mere manner of organization* that affects the burden on the land, but rather the purposes for which that organization uses the grant.

This question has been repeatedly before the courts, and existing property rights created by valid contract have never been forfeited simply by the technical expiration of corporate powers, contrary to the intention of the parties, and where the real parties interested could without injustice be protected.

In the case of *Mason v. Pewabic Mining Co.*, 133 U. S., page 50, this Court passed upon and decided such a question.

In *Detroit v. Detroit Citizens St. Ry. Co.*, 184 U. S., 368, see opinion 394-395, rights of similar character were also considered. In both of the foregoing cases grants *extending beyond the term of corporate existence*, were protected and sustained.

Fifth.

The decisions of the Courts of Michigan that property rights of the Pioneer Iron Company and the grant to it have expired, notwithstanding the terms of the lease;—and that said company, although reorganized under the laws of Michigan, could not so continue its existence as to hold said leasehold rights beyond 30 years, was technical indeed; and it must have resulted from the absence of this interested corporation, whose rights were thus at stake.

It is claimed that EVEN THOUGH THE PIONEER IRON COMPANY WAS REORGANIZED UNDER AUTHORITY OF THE CONSTITUTION AND LAWS OF THE STATE OF MICHIGAN, ADOPTED AND PASSED SUBSEQUENT TO THE GRANTING OF THE LEASE; YET IF THE RIGHTS UNDER SAID LEASE APPEARED TO CONTINUE IN THE COMPANY AS SO REORGANIZED, THE LAWS OF MICHIGAN SO ADOPTED WERE IN VIOLATION OF THE CONSTITUTION

OF THE UNITED STATES AND THE FOURTEENTH AMENDMENT THEREOF.

It has been shown that this lease was granted and received for the full end and term of 99 years, and that by its provisions it was made to *descend to the corporate successors of the Pioneer Iron Company.* The evident intention was to make such provision that though the existing corporate organization should expire within 30 years, yet the lease would remain unimpaired and would continue during its term of 99 years.

The effect of the amendment to the constitution and statutes of Michigan so far as it applied to the Pioneer Iron Company is to carry out and make effective the real intention of the parties, by keeping alive this lease which otherwise might have terminated through legal technicality, contrary to the plain terms of the instrument. Such legislation has repeatedly been considered in this Court and has as often been upheld.

Randall v. Kreiger, 23 Wall., 129-137, see 149;
Satterlee v. Mathews, 2nd Pet., 380;
Watson v. Mercer, 8 Pet., 88;
Gross v. Mortgage Co., 108 U. S., 488, 489;
Mortgage Co. v. Gross, 93 Ill., 483.

In the case of *Randall v. Kreiger,* 23 Wall., see page 149, this Court said:

> "To the objection that such laws violate vested rights of property, it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance, to the injury of the other party. Even where no remedy could be had in the Courts, the vested right is usually unattended with the slightest equity."

Inasmuch, however, as the foregoing claims as to constitutional invalidity were not passed upon by the Courts of Michigan, no further comment thereon is here necessary.

It is evident that no adjudication of any of the foregoing claims set forth as grounds for the termination of the 99 year lease, could have been had without directly involving the rights of the Pioneer Iron Company and its stockholders. The opinions of the Michigan Courts, and the judgment complained of, show that said claims were in fact decided adversely to the Pioneer Iron Company. That this was done in absence of that company is conceded. No conclusion, therefore, can be reached but that should this Court sustain such a decree the property and rights of the Pioneer Iron Company *will have been taken without due process of law.*

Respectfully submitted.

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